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Delegation, Administration, and Improvisation

Kevin Arlyck

Georgetown University Law Center, ka747@georgetown.edu

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DELEGATION, ADMINISTRATION, AND IMPROVISATION

Kevin Arlyck*

97 NOTRE DAME L. REV. __ (forthcoming 2021)

Nondelegation originalism is having its moment. Recent Supreme Court opinions suggest that a majority of justices may be prepared to impose strict constitutional limits on Congress's power to delegate policymaking authority to the executive branch. In response, scholars have scoured the historical record for evidence affirming or refuting a more stringent version of nondelegation than current Supreme Court doctrine demands. Though the debate ranges widely, sharp disputes have arisen over whether a series of apparently broad Founding-era delegations defeat originalist arguments in favor of a more stringent modern doctrine. Proponents—whom I call “nondelegationists”—argue that these historical delegations can all be explained as exceptions to an otherwise-strict constitutional limit.

As this article shows, it is highly doubtful that the Founding generation thought of delegation in such categorical terms. The evidence nondelegationists cite in favor of their preferred classifications—systematically assessed here for the first time—is remarkably thin. More importantly, this article highlights how, for the Founding generation, building the administrative capacity needed to fulfill the national government's responsibilities was not a quest to trace out hard constitutional boundaries between the branches. It was a dynamic and improvisational experiment in governance, in which Congress sought to mobilize the limited resources available to it in order to meet the myriad challenges the new nation faced.

To recapture early delegation's dynamism, this article focuses on the Remission Act of 1790. It gave the Secretary of the Treasury broad and unreviewable authority to remit statutory penalties for violations of federal law governing maritime commerce—power a strict nondelegation principle would not have allowed. This arrangement was not the obvious choice, and Congress considered vesting this power in a range of institutional actors before settling on the Secretary. Yet despite deep concerns over the wisdom—and even the constitutionality—of concentrating too much power in the hands of a single executive branch officer, Congress repeatedly affirmed this discretion, and the early Secretaries (including Alexander Hamilton) did not hesitate to use it.

This was a pattern Congress repeated elsewhere, making early delegations of varying breadth across the spectrum of federal administration. This experiment in governance was not easy, nor was it free from controversy. Disputes over how and where to allocate governmental authority were frequent and contentious. But if legislative debates occasionally sounded in a constitutional register, overwhelmingly they turned on the kinds of practical considerations that animated Congress's deliberations over the Remission Act. When it came to

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designing a workable administrative system for the new federal government, delegation's boundaries were apparently quite expansive.

INTRODUCTION	2
I. THE NONDELEGATION DEBATE	9
II. DELEGATING THE REMISSION POWER.....	17
A. <i>Remission and Revenue</i>	18
B. <i>Locating Remission</i>	22
C. <i>Affirming Remission</i>	25
D. <i>Remission and Discretion</i>	28
III. JUSTIFYING DELEGATION.....	31
A. <i>Delegation of Nonlegislative Power</i>	32
1. <i>Judicial Power</i>	33
2. <i>Executive Power</i>	37
B. <i>Permissible Delegation of Legislative Power</i>	41
1. <i>Foreign Affairs</i>	41
2. <i>Benefits</i>	46
3. <i>Unimportance</i>	49
4. <i>Necessity</i>	53
IV. DELEGATION AND IMPROVISATION AT THE FOUNDING.....	55
A. <i>Delegating to the Executive</i>	56
B. <i>Improvising Administration</i>	60
CONCLUSION.....	66

INTRODUCTION

Nondelegation originalism is having its moment. For most of the past century, the Supreme Court has been highly reluctant to impose any meaningful constitutional limit on Congress's ability to delegate rulemaking authority to the executive branch. Yet recent Court opinions suggest that five justices might be ready to adopt a more stringent view of the nondelegation doctrine, on originalist grounds. Most notably, in *Gundy v. United States*,¹ Justice Gorsuch argued in dissent that the Court's longstanding approach to

¹ 139 S.Ct. 2116 (2019).

nondelegation—which requires only that Congress provide the executive with an “intelligible principle” to guide administrative rulemaking²—“has no basis in the original meaning of the Constitution.”³ According to Gorsuch, “the framers” believed that Congress could not delegate to the executive branch “the power to adopt generally applicable rules of conduct governing future actions by private persons.”⁴ Given the apparent agreement of four other justices,⁵ Gorsuch’s opinion raises the possibility that the Court will soon impose significant limits on Congress’s ability to delegate authority to administrative agencies. Though the full scope and implications of such a decision are far from clear,⁶ a reinvigorated nondelegation doctrine could have a significant impact on how the modern administrative state functions.⁷

Given the potential stakes, both skeptics and supporters of the administrative state have recently explored in detail what people in the Founding era thought about Congress’s power to delegate legislative authority to the executive.⁸ Though the scholarly debate ranges broadly over a variety of pre-Ratification European and

² J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 410 (1928).

³ *Gundy*, 139 S.Ct. at 2139 (Gorsuch, J., dissenting).

⁴ *Id.* at 2133.

⁵ Chief Justice Roberts and Justice Thomas joined Justice Gorsuch’s dissent. *Id.* at 2131. In the same case, Justice Alito said he would be “willing to reconsider” the permissive approach mandated by the Court’s precedent. *Id.* (Alito, J., concurring in the judgment). Justice Kavanaugh has since suggested that Justice Gorsuch’s “thoughtful” opinion in *Gundy* merited “further consideration.” Paul v. United States, 140 S.Ct. 342 (Mem) (Nov. 25, 2019) (statement of Kavanaugh, J., respecting the denial of certiorari).

⁶ See Andrew Coan, *Eight Futures of the Nondelegation Doctrine*, 2020 WIS. L. REV. 141 (2020) (discussing “six possible scenarios” for the Court’s future nondelegation jurisprudence).

⁷ See Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. ____ (forthcoming 2021), at 19 (“[T]he nondelegation doctrine could become a genuine limit on Congress’s power to enlist agencies in the task of governance.”); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L. J. ____ (forthcoming 2021), at 6; (“[R]ulemaking is so ubiquitous that mere doubt about its constitutionality could work major changes in the nondelegation doctrine and administrative law more generally.”).

⁸ See Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3654564; Aaron Gordon, *Nondelegation*, 12 N.Y.U. J. L. & LIBERTY 718 (2019); Philip Hamburger, *Delegating or Divesting?*, Nw. U. L. Rev. Colloquy (2020), https://scholarlycommons.law.northwestern.edu/nulr_online/293; Gary Lawson, *Mr. Gorsuch, Meet Mr. Marshall: A Private-Law Framework for the Public-Law Puzzle of Subdelegation*, <https://ssrn.com/abstract=3607159>; Mortenson & Bagley, *supra* note ____; Parrillo, *Critical Assessment*, *supra* note ____; Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L. J. ____ (forthcoming 2021).

American sources,⁹ some of the sharpest disputes have arisen over the conclusions one can draw from early federal legislation. Throughout the 1790s (and well into the 19th century), Congress passed laws giving the executive branch significant policymaking discretion in a variety of domains—patents, foreign trade, military pensions, land taxation, and the postal system, to name a few.¹⁰

Delegation’s modern supporters view these Founding-era statutes as powerful evidence that nondelegation principles imposed a weak limit on the early Congress’s power to delegate—and perhaps no limit at all.¹¹ Proponents of a more demanding doctrine—whom I call “nondelegationists”—argue that such examples constituted permissible “exceptions” to an otherwise-strict limit, or that they were not delegations of legislative authority in the first place.¹² In the background of these disputes is a tacit acknowledgment that examination of early federal legislation may be the best way—perhaps the only way—to figure out whether the Constitution as originally understood included a nondelegation principle more stringent than the permissive one enshrined in modern Supreme Court doctrine.¹³

As a historical matter, however, the recent scholarly efflorescence risks obscuring as much as it reveals. Much of the

⁹ See, e.g., PHILLIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014); Mortenson & Bagley, *supra* note __, at 22-76; Wurman, *supra* note __, at 24-43.

¹⁰ See generally Mortenson & Bagley, *supra* note __, at 76-118.

¹¹ See Chabot, *supra* note __, at 3 (“[T]he theory and practice of delegation in the Founding era never reflected a particularly high constitutional bar.”); Mortenson & Bagley, *supra* note __, at 76 (“[T]he founders’ practice reflected their theory: regulatory delegations were limited only by the will and judgment of the legislature.”); Parrillo, *Critical Assessment*, *supra* note __, at 17 (“Vesting power in administrators to make sweeping discretionary decisions with high political stakes was not alien to the federal lawmakers who first put the Constitution into practice.”); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1735 (2002) ([C]onsistent early practice ... decisively established the permissibility of statutory grants to the president unchecked by any apparent intelligible principle.”).

¹² See Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J. L. & PUBLIC POLICY 147, 157 (2017) (“Outside the realm of foreign affairs ... [Congress] did not authorize the President ... to adopt rules that broadly regulated behavior of private individuals or entities ...”); Gordon, *supra* note __, 750 (asserting that “a few exceptions” to early nondelegation practice “do not reflect a view among the framing generation that no such prohibition existed”); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398-402 (2002) (arguing that six early examples did not “clearly vest legislative power in executive or judicial actors”); Wurman, *supra* note __, at 6. (“Most of this legislation ... from early Congresses is consistent with modern scholarly accounts of nondelegation.”).

¹³ See Parrillo, *Critical Assessment*, *supra* note __, at 7-8 (“[S]ources on original meaning besides early congressional acts—constitutional text, pre-ratification discourse, and structure—say very little about constitutional limits on delegation.”).

current literature tries to marshal the available evidence into a complete theory of nondelegation that accounts for all the legislation the early Congress actually passed. Nondelegationists, in particular, advance a number of different exceptional categories of delegation that they claim were originally understood to be permissible under the Constitution: delegations of “nonexclusive” legislative authority shared by the executive¹⁴; delegations regarding “foreign affairs”¹⁵ or public “benefits”¹⁶; delegations of authority to “fill up the details” on matters of lesser importance¹⁷; delegations out of “necessity.”¹⁸

These classifications’ historical accuracy is underexplored in the current scholarship, yet deeply important. Without such exceptions, it is difficult—if not impossible—for nondelegationists to reconcile a number of early congressional delegations with a stringent original understanding of nondelegation principles.¹⁹ Whether the justifications are based on foreign affairs, benefits, lack of importance, or some other category, they are essential to the nondelegationist effort to explain the early Congress’s apparent willingness to give significant policymaking discretion to the executive branch.

As this article shows, it is highly doubtful that the Founding generation thought of delegation and its limits in such categorical terms. The historical evidence nondelegationists cite in favor of their preferred taxonomies—systematically assessed here for the first time—is remarkably thin.²⁰ Simply put, no one at the Founding did

¹⁴ See Wurman, *supra* note __, at 38-43.

¹⁵ See *Gundy*, 139 S.Ct. at 2137 (Gorsuch, J., dissenting); Cass, *supra* note __, at 157-58; Gordon, *supra* note __, at 782-83.

¹⁶ See HAMBURGER, *UNLAWFUL*, *supra* note __, at 3 n.(b), 86-87; Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 178-82 (2019).

¹⁷ See Lawson, *Private-Law Framework*, *supra* note __, at 4; Wurman, *supra* note __, at 7.

¹⁸ See Lawson *Private-Law Framework*, *supra* note __, at 35-37; cf. also Chabot, *supra* note __, at 41-44 (suggesting a “necessity” theory might best explain early delegations).

¹⁹ See Mortenson & Bagley, *supra* note __, at 119-20; Parrillo, *Critical Assessment*, *supra* note __, at 9-10.

²⁰ See *infra* Part III.B. In their forthcoming article, Julian Mortenson and Nicholas Bagley generally deny that such exceptions existed at the Founding, but do not directly address the arguments put forth by nondelegationists. See Mortenson and Bagley, *supra* note __, at 4, 119-20. In an unpublished supplement to his forthcoming article, Nicholas Parrillo suggests that two exceptions—foreign affairs and privileges/benefits—may be “untenable,” but he does not evaluate all the evidence cited by nondelegationists, and ultimately assumes the exceptions’ validity for purposes of argument. See Nicholas R. Parrillo, *Supplemental Paper to: “A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s”*, at 19-20, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696902. A recent Note explores several early delegations specifically in the realm of

more than hint at the existence of such categories (and they barely even did that). If that is true, the originalist argument in favor of stricter constitutional limits on delegation seems to be defeated by the historical evidence.

The search for a restrictive original nondelegation doctrine also poses a deeper problem: It loses sight of the highly uncertain and improvisational nature of early American statebuilding. As this article illustrates, for members of the early Congress, building the administrative capacity needed to fulfill the new national government's critical responsibilities was not a quest to trace out hard constitutional boundaries between the branches.²¹ It was a dynamic, improvisational, and only partially successful experiment in governance, in which Congress sought to mobilize the limited resources available to it in order to meet the myriad challenges the nation faced. Whatever abstract limits the Constitution might have imposed on Congress's ability to allocate policymaking authority across the institutions of the nascent federal government, when it came to actually legislating they had little apparent effect.

To recapture early delegation's uncertainty and dynamism, this article explores the phenomenon through the lens of the Remission Act of 1790.²² The Act was the First Congress's most intriguing grant of legislative authority to the executive branch, yet it has largely been ignored in the nondelegation literature.²³ In it, Congress gave the Secretary of the Treasury a power to "regulat[e] private conduct" that modern nondelegationists would likely deem constitutionally impermissible.²⁴ Under the Act, the Secretary could waive entirely the statutory penalties imposed for violations of major federal laws governing customs collection and maritime

foreign affairs, and concludes that "[n]o one suggested the[y] were permissible solely by virtue of their foreign affairs subject matter." Note, *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1140 (2020).

²¹ See *infra* Part IV.

²² See Remission Act of 1790, § 1, 1 Stat. 122.

²³ See Gordon, *supra* note __, at 793 (three sentences); Lawson, *Original Meaning*, *supra* note __, at 401 (two paragraphs); Mortenson & Bagley, *supra* note __, at 86 (three sentences); Posner & Vermeule, *supra* note __, at 1735 (one sentence); Wurman, *supra* note __, at 38 (two sentences). This scholarly inattention is understandable. Congress established the Act in a one-paragraph statute, 1 Stat. 122, and the early Supreme Court only discussed it once, see, e.g., *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 291 (1825). As a result, the importance of the early Treasury Secretaries' remission authority only becomes apparent through archival research into how they actually used the power, something I have done in prior work. See Kevin Arlyck, *The Founders' Forfeiture*, 119 COLUM. L. REV. 1449, 1482-98 (2019).

²⁴ *Gundy*, 139 S.Ct. at 2136 (Gorsuch, J., dissenting).

commerce.²⁵ As long as the Secretary believed that the lawbreaker had acted without “intention of fraud,” he could impose as much or as little of the attendant fine or forfeiture as he “deem[ed] reasonable and just.”²⁶ There was no appeal from the Secretary’s decision—not to the courts, not to the President, and not to Congress.²⁷ In short, shortly after the Constitution was ratified, Congress did what Justice Gorsuch (and others) believe is constitutionally forbidden: It delegated to the executive branch Congress’s own authority to determine what financial punishments the government would impose on private individuals for violations of the law.²⁸

Perhaps unsurprisingly, agreement on how best to structure such a significant grant of discretion did not come easily. Remission of penalties was inherently a legislative power, exercised by Congress in the first instance.²⁹ But at Alexander Hamilton’s suggestion, Congress resolved to delegate that power elsewhere. Fueled by deep concerns over the wisdom of concentrating too much power in the hands of a single person, the legislature considered vesting its remission authority in a bewildering array of institutional actors—local federal officials, district court judges, a panel of cabinet officers, and the even the justices of the Supreme Court—before settling on the Treasury Secretary.³⁰ Reluctant to commit to this arrangement, Congress repeatedly reauthorized the Act on a temporary basis, and it was subject to renewed challenge—including on nondelegation grounds—before finally becoming permanent in 1800.³¹

As contested as the Act was, members of Congress did not think that the Constitution had much to say about it. To the contrary, they largely debated the Act on the basis of nonconstitutional values—efficiency, consistency, expertise, neutrality, capacity—which often cut in different directions. They argued over how best to balance the government’s law enforcement priorities against the obligation to treat citizens with justice. In so doing, they apparently felt free to experiment with various institutional arrangements, to come up with

²⁵ See Arlyck, *supra* note __, at 1482-98.

²⁶ See Remission Act of 1790, § 1, 1 Stat. 122.

²⁷ Arlyck, *supra* note __, at 1485 & n.215 (2019).

²⁸ See *Gundy*, 139 S.Ct. at 2144 (Gorsuch, J. dissenting) (“[I]t’s hard to see how giving the nation’s chief prosecutor the power to write a criminal code rife with his own policy choices might be [constitutionally] permissible.”); see also *infra* Part II.D.

²⁹ See *infra* Part II.B.

³⁰ *Id.*

³¹ See *infra* Part II.C.

solutions to the challenges of national governance that best balanced the competing considerations at play.³²

As this article explains, this was a pattern Congress repeated in other areas, making delegations of varying breadth to a range of government officials, across the spectrum of federal administration. In areas as diverse as revenue collection, disaster relief, and military development (among others), Founding-generation Americans displayed tremendous creativity in building a federal government that would be limited in its objects but vigorous in pursuing them.³³

This “extended improvisation” in governance was not easy, nor was it free from controversy.³⁴ Disputes over how and where to allocate governmental authority were frequent and contentious. And debaters occasionally advanced nondelegation arguments, rendering it at least plausible that Founding-era constitutional understandings included some theoretical limit on Congress’s ability to delegate its authority to the executive branch.³⁵ But whatever nondelegation principles such interlocutors may have had in mind, there is little evidence that they imposed anything more than a weak constraint on Congress’s discretion. When it came to the nitty-gritty of designing a workable administrative system for the new federal government, delegation’s boundaries were expansive indeed.

This article proceeds as follows. Part I reviews the current debate over whether the modern, permissive nondelegation doctrine is consistent with an originalist interpretation of the Constitution. The Part focuses particular attention on the various ways in which nondelegationist scholars have sought to reconcile the best evidence of the Constitution’s original meaning—early federal statutes—with a stringent view of constitutional limits on delegation.

Part II describes the Remission Act’s origins, revealing the challenge Congress faced in designing a system for remitting statutory penalties that would balance protection of federal revenue against lenity for unintentional lawbreakers. In light of deep concerns about the wisdom of concentrating legislative power in a single executive-branch official, Congress considered a number of different options before ultimately conferring broad and

³² See *infra* Part IV.A.

³³ See *infra* Part IV.B.

³⁴ Daniel J. Hulsebosch, *The Founders’ Foreign Affairs Constitution: Improvising Among Empires*, 53 ST. LOUIS U. L.J. 209, 213 (2008).

³⁵ See Mortenson & Bagley, *supra* note __, at 6 (“A smattering of comments by a handful of commentators did very occasionally suggest that legislatures might not be able to irrevocably alienate their power to make laws.”).

unreviewable authority on the Treasury Secretary. Despite ongoing objections to this arrangement, Congress repeatedly reauthorized the Act throughout the 1790s, and the early Treasury Secretaries—including Alexander Hamilton—did not hesitate to use their power to waive statutory penalties set by Congress.

In light of this history, Part III uses the Remission Act as a vehicle for assessing the various theories advanced by nondelegationists to reconcile early legislation with a stringent version of the doctrine. The Part first concludes that the Act itself cannot be explained satisfactorily by any of the theories. Even if remission might resemble an exercise of traditional executive authority (such as prosecutorial discretion or pardon), or can be seen as relating to foreign affairs or the provision of public benefits, the Act does not fit easily into any proposed exceptional category.

In so doing, Part III also answers a broader—and more important—question: Are these “exceptions” historically accurate? By carefully considering the limited evidence cited by proponents, and the significant evidence against, Part III concludes that such categorical conceptions of nondelegation almost certainly did not exist. As a result, there are a number of early delegations by Congress, in addition to the Remission Act, that can only be explained by the conclusion that there was not much of a nondelegation doctrine at the Founding at all.

Part IV steps back, to consider how and why the early Congresses granted such power to the Treasury Secretary in the first place. In struggling to design an administrative system for commercial regulation and revenue collection, Congress considered a variety of arrangements that might strike the right balance between several different administrative values. Delegation to the Treasury Secretary was not the obvious choice—it was simply the best one Congress could come up with. As this Part shows, the same was true in other areas, offering a new perspective on familiar Founding-era episodes in the nondelegation scholarship. Across the domains of federal administration, strict constitutional limits on what powers and responsibilities the legislature could delegate to another branch were not what shaped the early regime.

I. THE NONDELEGATION DEBATE

For nearly all of its history in the Supreme Court, nondelegation has operated as a famously weak limit on Congress’s ability to

delegate legislative authority to the executive branch.³⁶ The Court has only ruled three times that a statute was an unconstitutional delegation, all in the New Deal era.³⁷ It has repeatedly upheld very broad delegations in the face of constitutional challenge.³⁸ Given this history, more than one commentator has declared the nondelegation doctrine effectively to be a dead letter.³⁹

Recently, nondelegation has experienced a revival. Building on a strand of legal scholarship insisting that the Supreme Court's "intelligible principle" test is incompatible with Founding-era views about the delegation of legislative authority,⁴⁰ a majority of the current Court may be prepared to adopt a more stringent version of the doctrine. Without a doubt, the view recently articulated by Justice Gorsuch in *Gundy* would represent a significant change in approach. According to Justice Gorsuch, Congress cannot give the President or an agency the discretion to "adopt generally applicable rules of conduct governing future actions by private persons"⁴¹—which it has done in many statutes, including several upheld by the Court in the past.⁴² As a number of commentators have noted, the Supreme Court's adoption of this test would call into question the constitutionality of major delegations of legislative authority.⁴³ Even assuming the Court would hesitate before striking down

³⁶ See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) ("We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting).").

³⁷ See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

³⁸ See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190, 225-26 (1943) ("public interest, convenience, or necessity"); Whitman v. American Trucking Associations, 531 U.S. 457, 472 (2001) ("requisite to protect the public health" with "an adequate margin of safety").

³⁹ See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 132-33 (1980); Posner & Vermeule, *supra* note __, at 1722.

⁴⁰ See Lawson, *Original Meaning*, *supra* note __; HAMBURGER, UNLAWFUL, *supra* note __; Cass Delegation, *supra* note __; Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TULANE L. REV. 265 (2001).

⁴¹ *Gundy*, 139 S.Ct. at 2133 (Gorsuch, J., dissenting). The rules articulated by Justices Thomas and Gorsuch are not identical, but they are substantively similar. *Dept. of Transportation v. Association of American Railroads*, 575 U.S. 43, 70 (Thomas, J., concurring in the judgment) (Congress cannot delegate authority to "formulate generally applicable rules of private conduct").

⁴² See *Mistretta v. United States*, 488 U.S. 361, 373-74 (1989) (citing examples).

⁴³ See *Gundy*, 139 S.Ct. at 2130 (plurality opinion) (asserting that if SORNA is unconstitutional, "then most of Government is unconstitutional"); Mortenson & Bagley, *supra* note __, at 18-20.

important federal legislation on nondelegation grounds,⁴⁴ a more demanding doctrine could have significant repercussions for the administrative state more generally.⁴⁵

Justice Gorsuch justified his test based on what he understands to be the Constitution’s “original meaning”⁴⁶ and the “guiding principles” left to us by “the framers.”⁴⁷ Yet the historical evidence he cites in *Gundy* does little to support his proposed version of nondelegation. His opinion includes several references to the Federalist, a quotation from John Locke, and citation to three early nineteenth-century cases. Justice Thomas’s precursor opinion in *Department of Transportation v. Association of American Railroads* relies more heavily on citations to pre-revolutionary English precedent (stretching back to Magna Carta), and a sprinkling of Founding-era sources (mostly from the Federalist).⁴⁸ At best, these materials suggest that nondelegation is consistent with separation of powers principles more generally.⁴⁹ None of them articulate anything like the test the Justices purport to derive from the historical record.⁵⁰

That said, Justice Gorsuch also cited a handful of scholars who argue that the Court’s twentieth-century nondelegation doctrine is incompatible with Founding-era views.⁵¹ In *Gundy*’s wake, these skeptics have been joined by several more.⁵² In response, several defenders of the modern doctrine have engaged in their own deep investigations into Founding-era sources.⁵³ The collective result is a

⁴⁴ See Coan, *supra* note __, at 142 (“A sweeping revolution in U.S. constitutional law is unlikely to be imminent.”).

⁴⁵ See Bamzai, *supra* note __, at 169 (suggesting that, following *Gundy*, the Court may read delegating statutes more narrowly to avoid a constitutional difficulty).

⁴⁶ *Gundy*, 139 S.Ct. at 2139 (Gorsuch, J., dissenting).

⁴⁷ *Id.* at 2135-36.

⁴⁸ 575 U.S. 43, 69-76 (2015).

⁴⁹ See *Gundy*, 139 S.Ct. at 2135 (Gorsuch, J., dissenting) (“[T]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.” (quoting The Federalist No. 47, (C. Rossiter ed. 1961), at 302 (Madison))).

⁵⁰ See Mortenson & Bagley, *supra* note __, at 22 (“[T]he only actual quotes from historical sources [in Justice Gorsuch’s *Gundy* opinion] either speak generally to the undesirability of vesting all constitutional powers in one body or recite the familiar reasons that the Constitution makes legislating hard.”); see generally Parrillo, *Supplemental*, *supra* note __, at 3-13.

⁵¹ See *Gundy*, 139 S.Ct. at 2135-40 (Gorsuch, J., dissenting) (citing, e.g., Cass, *supra* note __, at 153; HAMBURGER, UNLAWFUL, *supra* note __, at 378; Lawson, *Original Meaning*, *supra* note __, at 340).

⁵² See *supra* note __.

⁵³ See *supra* note __.

far richer exploration of the historical evidence than found in recent Supreme Court opinions.

The challenge for originalist analysis of nondelegation is that the usual sources of evidence—text, structure, and pre-ratification discourse—are largely unhelpful in identifying the doctrine’s precise contours.⁵⁴ As conceded on all sides, the constitutional text itself tells us virtually nothing.⁵⁵ Article I says that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,” but does not say anything about whether Congress can delegate those powers to non-legislative actors.⁵⁶ Arguments from constitutional structure do not get us much further. A stringent view of nondelegation might be consistent with a tripartite division of governmental authority⁵⁷ (or with other features of American constitutionalism, like federalism⁵⁸). But even proponents of a structural basis for nondelegation concede that such an approach provides little clarity as to how the doctrine might apply in practice.⁵⁹ Finally, pre-ratification discourse suffers from similar flaws. While scholars on both sides of the debate cite extensively to statements made by British and American legal and political thinkers in the 17th and 18th centuries, the most such sources can tell us is that there was *some* limit on the legislature’s power to give

⁵⁴ See Parrillo, *Supplemental Paper*, supra note __, at 3-13.

⁵⁵ See, e.g., Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2127 (2004); Lawson, *Original Meaning*, supra note __, at 335.

⁵⁶ U.S. Const., Art. I, § 1. Even if a limit on delegation could be implied, cf. *Hamburger Divesting 1* (“The Constitution vests legislative powers in Congress, and that body therefore cannot divest itself of the power that the Constitution vests in it.”), the text offers no indication of what delegations that limit might permit or prohibit, see Parrillo, *Supplemental Paper*, supra note __, at 4 n.7.

⁵⁷ See *Gundy*, 139 S.Ct. at 2133-37 (Gorsuch, J., dissenting); Gary Lawson, *Discretion and Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005) Rappaport, supra note __, at 305-10. But see Mortenson & Bagley, supra note __, at 21-59 (original understandings of legislative and executive power do not imply any limit on delegation except permanent alienation of legislative power).

⁵⁸ See Jennifer Mascott, *Early Customs Laws and Delegation*, 87 Geo. Wash. L. Rev. 1388 (2020).

⁵⁹ See, e.g., Rappaport, supra note __, at 78 (conceding his structure-derived test is “vague and difficult to apply”). But cf. Lawson, *Private-Law Framework*, supra note __, at 7-8 (arguing that a prohibition on delegations involving “important subjects” is implicit in the Constitution’s nature as a fiduciary instrument governed by agency law principles).

away rulemaking authority.⁶⁰ They do not offer standards for assessing the constitutionality of particular delegations.⁶¹

The lack of specificity in much of the historical evidence presents a significant problem. As everyone from James Madison,⁶² to John Marshall,⁶³ to Antonin Scalia⁶⁴ has recognized, what bedevils the nondelegation doctrine is the difficulty of formulating a test that consistently and predictably distinguishes permissible delegations from impermissible ones.⁶⁵ Indeed, the difficulty of this line-drawing exercise is one of the reasons the Supreme Court adopted the “intelligible principle” test in the first place.⁶⁶

The difficulty of deriving a workable rule from text, structure, and pre-Ratification discourse is—or at least should be—a particular concern for nondelegationists. After all, they want to *overrule* the Court’s precedent, and replace the “intelligible principle” test with a more demanding one.⁶⁷ As a result, they bear the burden of proving that the Court’s longstanding approach to nondelegation contravenes the Constitution’s original meaning. How heavy a

⁶⁰ The fact that the same sources can lead scholars to profoundly different conclusions highlights the indeterminacy of the principles such sources supposedly express. Compare *Gundy*, 139 S.Ct. at 2133-3 (Gorsuch, J., dissenting) (discussing JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION), with *Mortenson & Bagley*, supra note __, at 31-34 (same).

⁶¹ In addition, as Nicholas Parrillo points out, pre-revolutionary English sources on the limits of legislative authority may be of questionable value in interpreting the U.S. Constitution, given the British tradition of parliamentary supremacy over the English constitution. Parrillo, *Supplemental Paper*, supra note __, at 5-6; see also *Hamburger, Divesting*, supra note __, at 3 (critiquing *Mortenson and Bagley* for “quot[ing] mostly Europeans”).

⁶² 3 ANNALS OF CONG. 238-39 (1791) (Madison) (conceding the difficulty of “determin[ing] with precision the exact boundaries of the legislative and executive powers”).

⁶³ See *Wayman v. Southard*, 23 U.S. 1, 46 (1825) (the “precise boundary of” the legislature’s authority to “commit something to the discretion of the other departments” was “a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily”).

⁶⁴ See *Mistretta v. United States*, 488 U.S. 361, 414 (1989) (Scalia, J., dissenting) (because “no statute can be entirely precise ... the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree”).

⁶⁵ See *Gundy*, 139 S.Ct. at 2139 (Gorsuch, J., dissenting) (“[T]he exact line between policy and details, lawmaking and fact-finding, and legislative and non-legislative functions ha[s] sometimes invited reasonable debate ...”).

⁶⁶ See *Whitman v. American Trucking Associations*, 531 U.S. 457, 474-75 (2001) (“[W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”).

⁶⁷ See *Gundy*, 139 S.Ct. at 2139 (Gorsuch, J., dissenting) (“Th[e] ... “intelligible principle” remark has no basis in the original meaning of the Constitution ...”).

burden is subject to debate,⁶⁸ but, as the Court recently indicated, at minimum *stare decisis* requires “something more than ambiguous historical evidence” before the Court will “flatly overrule ... major decisions.”⁶⁹

Given the indeterminacy of text, structure, and pre-ratification discourse, scholars have devoted significant attention to post-ratification events—in particular, the passage (or defeat) of legislation delegating rulemaking authority to the executive branch.⁷⁰ This evidence has two significant advantages.⁷¹ First, it offers actual examples of delegations the early Congresses made to the executive branch, which can help us understand more precisely which *kinds* of delegations were understood to be constitutionally permissible.⁷² Second, examining the output of a representative legislature reduces the danger of relying on statements made by individuals, which may represent idiosyncratic views.⁷³ In addition, delegations that gained support across political divides and endured through time—like the Remission Act⁷⁴—are unlikely to be aberrational. Instead, they are likely the most reliable evidence we have of what limits—if any—the Founding generation thought the Constitution imposes on delegations of legislative power.

The difficulty for nondelegationists is that Congress’s early practice is not in their favor. For starters, there is little affirmative evidence in favor of a more stringent test for nondelegation than the Court’s current “intelligible principle” formulation. By my count, nondelegationists point to only four examples of Congress rejecting a Founding-era legislative proposal on nondelegation grounds. As I explain later in this article (for the first time in the literature), it is doubtful whether nondelegation concerns shaped three of the enactments at all.⁷⁵ Nondelegation was more clearly at issue in the fourth episode, which involved a well-studied 1792 statute

⁶⁸ Whether the principle of *stare decisis* is compatible with an originalist theory of constitutional interpretation is the subject of much scholarly debate. In particular, commentators diverge on when—if ever—a precedent that is wrong on originalist grounds can nonetheless be left intact. See, e.g., Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1922 (2017).

⁶⁹ *Gamble v. United States*, 139 S.Ct. 1960, 1969 (2019).

⁷⁰ See *supra* notes ___ to ___.

⁷¹ See generally John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENTARY 371, 378-79 (2007).

⁷² See Parrillo, *Supplemental Paper*, *supra* note ___, at 11-12.

⁷³ Posner & Vermeule, *supra* note ___, at 1737.

⁷⁴ See *infra* Part II.C.

⁷⁵ See *infra* notes ___ to ___ and accompanying text (1793 Patent Act); *infra* note ___ (1809 and 1810 embargo acts).

establishing the federal postal system. But the evidence from that episode is contradictory at best.⁷⁶ Of course, it is possible that a stringent view of nondelegation influenced the early Congress in unspoken ways—by influencing members’ votes, or dissuading them from proposing broad delegations in the first place. Such possibilities, however, are not actual *evidence* of a robust Founding-era doctrine.⁷⁷

The greater problem for nondelegationists is that there *is* affirmative evidence supporting an expansive Founding-era view of delegation. As a recent scholarship has shown, throughout the early period Congress repeatedly gave the executive branch broad authority to fashion rules governing private conduct.⁷⁸ Though the Remission Act is largely overlooked in this literature, it is a compelling example.⁷⁹

Nondelegationists respond to this evidence by asserting that certain kinds of delegations *were* permissible at the Founding, even if the Constitution generally barred Congress from giving legislative authority to the executive.⁸⁰ Justice Gorsuch, for example, believes there were several caveats to the general prohibition on delegation. Congress could authorize another branch to “fill up the details” of a statutory scheme, as long as it first made “the policy decisions ... regulating private conduct.”⁸¹ Scholars have echoed that view, arguing that Congress could not delegate rulemaking authority over “important” matters, but could with respect to less-

⁷⁶ See *infra* notes __ to __ and accompanying text.

⁷⁷ See Mortenson & Bagley, *supra* note __, at 22 (“The original public meaning of constitutional text ... can’t be a secret or hidden meaning.”)

⁷⁸ Mortenson and Bagley document this phenomenon in detail. Mortenson & Bagley, *supra* note __, at 68-88, 99-111; see also Parrillo, *Supplemental Paper*, *supra* note __, at 13-16 (listing examples); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 5 (2012) .

⁷⁹ See *supra* Part II.D.

⁸⁰ In addition to the exceptions discussed here, Justices Gorsuch and Thomas suggest that Congress can make application of a rule governing private conduct depend on executive fact-finding. See *Gundy*, 139 S.Ct. at 2136 (Gorsuch, J., dissenting); *American Railroads*, 575 U.S. at 79 (Thomas, J., concurring in the judgment). The classic example is “contingent legislation”—a statute that goes into effect on the occurrence of a particular event, the identification of which is a “factual” question permissibly left to the executive branch. See *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693 (1892) (“[T]he president was ... the mere agent of [Congress] to ascertain and declare the event upon which its expressed will was to take effect.”). As even nondelegationists concede, successfully applying such a distinction depends “on the clarity of the line between fact and law, and that is decidedly not a clear line.” Gary Lawson, *I’m Leavin’ It (All) Up to You: Gundy and the (Sort-of) Resurrection of the Subdelegation Doctrine*, *CATO S. CT. REV.* 31, 66-67 (2019).

⁸¹ *Gundy*, 139 S.Ct. at 2136 (Gorsuch, J., dissenting).

important “details.”⁸² In *Gundy* Justice Gorsuch also invoked an exception allowing delegation when the power in question “overlaps” with authority the Constitution vests in another branch—for example, with respect to foreign affairs⁸³ (another category echoed by commentators⁸⁴). Several scholars have also suggested that Congress could originally delegate authority to regulate the provision of public benefits, if not private rights⁸⁵—a position Justice Thomas seems to endorse.⁸⁶ Finally, several scholars have suggested (at least implicitly) that Congress historically could delegate authority to the executive branch when it was “necessary”—i.e., when the task delegated was one Congress simply could not perform itself.⁸⁷

These exceptions are profoundly important for the nondelegationist position. As I explain in more detail in Part III, without them originalist proponents of a more stringent version of the doctrine have difficulty explaining a number of broad delegations made by the Congress.⁸⁸ To be sure, even taken at face value these exceptions may not sufficiently explain all instances in which Congress granted legislative authority to the executive, as there are Founding-era delegations—including the Remission Act itself⁸⁹—that do not fit easily into any exceptional category.⁹⁰

⁸² See Lawson, *Private-Law Framework*, supra note __, at 7-8; Wurman, supra note __, at 11.

⁸³ *Gundy*, 139 S.Ct. at 2136 (Gorsuch, J., dissenting).

⁸⁴ See Gordon, supra note __, at 782; Rappaport, supra note __, at 352-54; Wurman, supra note __, at 48-49.

⁸⁵ See HAMBURGER, UNLAWFUL, supra note __, at 3 n.b, 85-87; Bamzai, supra note __, at 182 (“A distinction between rights and privileges might explain several laws enacted in early Congresses that delegated authority to the executive branch”); Wurman, supra note __, at 52 (“Perhaps Congress had more power to delegate authority to establish public privileges.”)

⁸⁶ *American Railroads*, 575 U.S. at 83 & n.7 (Thomas, J., concurring in the judgment).

⁸⁷ See Chabot, supra note __, 40-43; Lawson *Private-Law Framework*, supra note __, at 35-37; Wurman 47-48, 49, 50.

⁸⁸ See Hamburger *Divesting* 15 (delegation defenders “do[] not point to any instance when the Executive, with or without congressional authorization, made binding rules or adjudications that were national and domestic in their scope”); Aaron Gordon, A Rebuttal to “Delegation at the Founding,” at 32, <https://ssrn.com/abstract=3561062> (“[E]very enactment [delegation defenders] discuss either falls into one of the well-established ‘exceptions’ to the principle of nondelegation or is obviously not a delegation of legislative power at all.”); Wurman 44-58 (describing several early delegations as addressing subjects that were not “important”).

⁸⁹ See infra Part III.

⁹⁰ See, e.g., Parrillo, *Critical Assessment*, supra note __, at 10 (arguing that a 1798 land tax does not fall into either the foreign affairs or privileges exceptions).

More importantly, it is highly doubtful whether these exceptions actually existed at the Founding. As I further explore in Part III, there is virtually no evidence in their favor, and meaningful evidence against.⁹¹ If that analysis is correct, the originalist argument in favor of a more stringent nondelegation doctrine seems to be significantly flawed, as it cannot account for a number of broad delegations of legislative authority at the Founding. But before assessing the historical viability of these categories more generally, the following Part sets the stage by detailing what arguably was the First Congress's most significant delegation—the Remission Act of 1790.

II. DELEGATING THE REMISSION POWER

For such a statute granting such important power, the Remission Act's origins were innocuous enough. On January 19, 1790, Alexander Hamilton sent a letter to the House of Representatives. His ostensible purpose was to report on the petition of Christopher Saddler, an American mariner seeking relief from a fine imposed for his noncompliance with customs regulations Congress had enacted six months earlier. The House committee charged with responding to Saddler's petition referred it to Hamilton for a recommendation. In his brief report, Hamilton had little to say about Saddler himself. Though Hamilton thought that relief was likely justified, he wanted more information about the case before making a formal recommendation.⁹²

Hamilton did not stop there, however. Instead, “avail[ing] himself of the occasion” the petition presented, Hamilton urged the House to develop a comprehensive solution to the problem of unintentional customs violations. As Hamilton explained, there were many cases in which “considerable forfeitures” had been incurred by persons who had unintentionally broken the law. In his view, this state of affairs made it a “necessity” that Congress “vest[] somewhere a discretionary power of granting relief.” Hamilton did not say *in whom* such a power should be vested; given its potential impact on the federal fisc, that question was of such “delicacy and importance” that it should be the subject of “mature deliberation.” But Hamilton clearly did not think Congress should retain the power

⁹¹ See *infra* Part III.B.

⁹² Report on the Petition of Christopher Saddler, 19 January 1790 [Saddler Report], <https://founders.archives.gov/documents/Hamilton/01-06-02-0089>.

for itself, if only to avoid the “inconvenience” of having to rule on individual applications for relief.⁹³

Hamilton’s lobbying effort bore fruit five months later, when Congress passed the Remission Act of 1790. The Act transferred to the Treasury Secretary the legislature’s own authority to spare from punishment those who unintentionally violated important federal revenue laws. As this Part explains, the question of where to locate such an important power provoked intense debate in Congress, which considered numerous configurations of authority before settling on the Treasury Secretary.⁹⁴ Uncertainty and dispute continued through the 1790s, even as the first Treasury Secretaries—Hamilton included—exercised the power to its fullest extent.⁹⁵ Ultimately, however, remission became a permanent feature of the early administrative landscape, bestowing upon the executive a discretionary authority that rivals those that modern nondelegationists find so objectionable.⁹⁶

A. Remission and Revenue

At its core, remission was about revenue. When Congress first convened in 1789, one its first orders of business was to pass legislation regulating the collection of customs duties on goods imported into the United States by sea. This was no small matter. Customs duties were the federal government’s lifeblood, constituting more than ninety percent of total revenue for the first two decades following Ratification.⁹⁷ It is no exaggeration to say that, without an effective means of collecting such duties, the federal government would simply have been unable to function.⁹⁸

There were two principal statutes regulating customs. The Collection Act of 1789 served three purposes: It detailed the duties owed on various categories of goods; it announced regulations on the manner of importation; and it prescribed rules governing federal officers’ collection of duties owed.⁹⁹ Its companion, the Registering Act of 1789, had a narrower scope, but was no less important: It specified the requirements for registering a ship as a “vessel of the

⁹³ Id.

⁹⁴ See *infra* Part II.B.

⁹⁵ See *infra* Part II.C.

⁹⁶ See *infra* Part II.D.

⁹⁷ See Arlyck, *supra* note ___, at 1466.

⁹⁸ See GAUTHAM RAO, NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE 6-8 (2016) (“[C]ustoms revenue almost singlehandedly funded the federal government.”)

⁹⁹ See generally Collection Act of 1789, 1 Stat. 29.

United States,” a status that exempted it from payment of the duties on imports specified in the Collection Act.¹⁰⁰

Crucially, both statutes prescribed fines and forfeitures for violations of many of the acts’ provisions. These penalties ranged broadly, from a one hundred dollar fine for lesser offenses, to forfeiture of goods and vessels themselves (often worth thousands of dollars).¹⁰¹ To impose a statutorily-prescribed penalty, the government had to go to federal district court, which had exclusive jurisdiction over all suits for “penalties and forfeitures” under federal law.”¹⁰² In the vast majority of early forfeiture suits adjudicated in federal district court, no one filed a claim in opposition, resulting in a default judgment for the government.¹⁰³ In adversarial cases, fines were tried to a jury, but forfeitures (mostly) were not.¹⁰⁴

The government’s ability to penalize customs violators was crucial. Whenever someone failed to pay the prescribed duties, or evaded the customs regime entirely by registering their vessel as American, revenue suffered. But collection was difficult. According to many historians, early Americans were inveterate smugglers—a tradition that dated back to the colonial period and continued forward through the War of 1812 and beyond.¹⁰⁵ The Atlantic coastline’s sheer length presented a huge challenge to the skeletal staff of customs officers responsible for collecting customs revenue. Given the difficulties federal officers faced in detecting customs violations, deterrence depended on the prospect of significant penalties. Fines and forfeitures were financially important in a more direct way, too. By law, half of any penalty was shared among the three principal customs officers for the district in which the seizure

¹⁰⁰ See generally Registering Act of 1789, 1 Stat. 55.

¹⁰¹ See, e.g., Registering Act of 1789, § 30, 1 Stat. 55, 64; Collection Act of 1789, § 12, 1 Stat. 29, 39.

¹⁰² Judiciary Act of 1789, § 9, 1 Stat. 73, 77.

¹⁰³ See Arlyck, *supra* note __, at 1470, 1488.

¹⁰⁴ See *id.* at 1471-72.

¹⁰⁵ See, e.g., JOSHUA M. SMITH, *BORDERLAND SMUGGLING: PATRIOTS, LOYALISTS, AND ILLICIT TRADE IN THE NORTHEAST, 1783-1820* (2006). But cf. RAO, *supra* note __, at 140-41 (“Though it is impossible to say with any certainty, in all likelihood only a small fraction of American merchants smuggled on a large scale.”) .

took place¹⁰⁶—a significant financial inducement for federal officers whose compensation was otherwise fairly low.¹⁰⁷

There was just one problem: As Hamilton and his contemporaries recognized (both in 1790 and later), under the customs laws there was a real danger of significant fines and forfeitures resulting from unintentional violations. Indeed, the first Collection Act created largely a strict liability regime; with a few exceptions, those who violated the Act were subject to penalties irrespective of whether they intended to evade paying the duties they owed.¹⁰⁸

For many contemporaries, this rigidity was essential. According to the Remission Act's chief congressional proponent, Fisher Ames, Congress had two choices in designing the customs system. It could make the laws governing collection "loosely," which would give customs officers "considerable discretion" in executing them. Or it could make the rules "so strict as to be in some degree rigid."¹⁰⁹ The latter was the better approach,¹¹⁰ as effective revenue collection depended on the consistent application of "certain rule[s]."¹¹¹ Hamilton agreed; as he explained to the New York legislature in 1787, "certainty" was one of the two "great objects" of any taxation system.¹¹²

The need for "certainty" was especially acute with respect to the penalties that attached to statutory violations. As Hamilton explained to Congress the same year the Remission Act passed, "the security of the revenue" could not depend on voluntary compliance with the customs laws.¹¹³ Lax enforcement would merely encourage those who owed duties on imported goods to "avoid ... payment."¹¹⁴ Accordingly, as Hamilton's successor later instructed customs

¹⁰⁶ Collection Act of 1789, § 38, 1 Stat. 29. If the forfeiture was recovered thanks to information from an informant, that person received a quarter of the proceeds, drawn from the principal officers' share. *Id.*

¹⁰⁷ See Arlyck, *supra* note __, at 1469, 1510 n.352.

¹⁰⁸ For example, of the dozens of prohibitions in the Collection Act, only two depended on the offender's state of mind. See Collection Act of 1789, §§ 16, 23, 1 Stat. 29, 41, 43.

¹⁰⁹ 6 ANNALS OF CONG. 2286 (Ames).

¹¹⁰ See 6 ANNALS OF CONG. 2286 (Ames) ("He thought the latter the best mode.")

¹¹¹ See 1 ANNALS OF CONG. 1127 (Ames).

¹¹² Alexander Hamilton to New York Assembly, 17 February 1787, 4 PAPERS OF ALEXANDER HAMILTON 95 (Jacob Cooke, ed., 1961). The other was "equality." *Id.*

¹¹³ Final Version: First Report on the Further Provision Necessary for Establishing Public Credit, [13 December 1790], <https://founders.archives.gov/documents/Hamilton/01-07-02-0227-0003>.

¹¹⁴ *Id.*

collectors, they had to execute the laws “without reference to any circumstances of fraud or innocence.”¹¹⁵ Only the “strictest method” of enforcement could prevent the revenue system “from being deranged.”¹¹⁶ Or, in the words of one of the Remission Act’s original proponents in Congress, imposition of the fines and forfeitures prescribed for customs violations should be “nearly inevitable,” to ensure “safe and effectual collection of the revenue.”¹¹⁷

As everyone recognized, however, strict enforcement of the customs laws could result in manifest injustice.¹¹⁸ Indeed, Hamilton proposed creation of a remission mechanism precisely because violators could be subject to “considerable forfeitures” simply due to “inadvertence” or “want of information.”¹¹⁹ Members of Congress agreed. “[N]o person,” argued one, “ought to be liable ... who is not guilty of a violation of the laws intentionally or willfully.”¹²⁰ If the rules governing customs collection were to be “strict,” then it was necessary to provide “some relaxation” in deserving cases.¹²¹ In that sense, remission was a power “co-existent with the revenue laws.”¹²² Indeed, as one representative noted, it would be “impossible to get along” without “a power placed somewhere to remit penalties.”¹²³ Granting relief in such cases would not be a question of “mercy”—it was instead a matter of “justice.”¹²⁴

The remission power may have been necessary, but it was also dangerous. If not exercised carefully, it would lessen the certainty of rule-enforcement and hamper revenue collection more than it

¹¹⁵ Oliver Wolcott to Robert Purviance, 6 May 1797, quoted in Frederick Arthur Baldwin Dalzell, *Taxation with Representation: Federal Revenue in the Early Republic* 168 (1993) (unpublished Ph.D. dissertation, Harvard University).

¹¹⁶ *Id.*

¹¹⁷ 1 ANNALS OF CONG. 1475 (Lawrence).

¹¹⁸ See 1 ANNALS OF CONG. 1475 (Lawrence) (fines and forfeitures for customs violations “ought to be as nearly inevitable as is in any ways *consistent with mercy to individuals*” (emphasis added)).

¹¹⁹ Saddler Report, *supra* note ____.

¹²⁰ 1 ANNALS OF CONG. 1128 (Sturgis).

¹²¹ 6 ANNALS OF CONG. 2286 (Ames); see also 1 ANNALS OF CONG. 1128 (Lawrence): (without remission, “persons absolutely violating the laws, whether intentionally or through ignorance, would ... be precluded from all relief”); 6 ANNALS OF CONG. 2291 (1797) (Coit) (the original 1790 remission act was “necessary” because “[i]t was made the duty of officers to prosecute in all cases”).

¹²² 6 ANNALS OF CONG. 2285 (Sitgreaves).

¹²³ 6 ANNALS OF CONG. 2287 (Coit).

¹²⁴ 1 ANNALS OF CONG. 1128 (Sturgis).

would benefit deserving individuals.¹²⁵ To members of Congress, it was therefore a “delicate power,”¹²⁶ to be exercised with “a great deal of circumspection.”¹²⁷ Indeed, some representatives opposed the Remission Act entirely on the ground that it would undermine customs collection and harm the federal fisc.¹²⁸ Therefore, the goal in structuring the remission power, according to Ames, was to grant relief while creating “the least risk of injuring the revenue.”¹²⁹

B. *Locating Remission*

Now came the hard part—figuring out where to locate this “delicate power.”¹³⁰ Up until Hamilton tendered his proposal, the task of balancing the need for revenue against the demands of justice had fallen on the legislature itself. Before passage of the Remission Act (and after), individuals who thought they did not deserve punishment for their statutory violations sought relief directly from Congress.¹³¹

This was not unusual. Before and after ratification of the Constitution, at both the state and national level, individuals typically presented their claims against the government to the legislature.¹³² This was true not only with respect to requests for government largesse, as with military pensions¹³³ and disaster relief,¹³⁴ but also for those seeking respite from the allegedly unjust application of general laws.¹³⁵ Indeed, as recent scholarship has shown, one of the early Congresses’ most important functions was

¹²⁵ 1 ANNALS OF CONG. 1129 (Stone).

¹²⁶ 6 ANNALS OF CONG. 2286 (Ames).

¹²⁷ 1 ANNALS OF CONG. 1475 (Lawrence).

¹²⁸ See 12 Documentary History of the First Federal Congress of the United States of America 175 (Helen E. Veit, ed., 1994) [DHFFC] (“[A] few were of the opinion, that the passing of any act for the remission of fines, would operate to a great disadvantage of the public revenue.”);

¹²⁹ 1 ANNALS OF CONG. 1127 (Ames)

¹³⁰ 6 ANNALS OF CONG. 2286 (Ames).

¹³¹ See, e.g., 8 DHFFC 421-27 (describing pre-Remission Act petitions submitted to First Congress); 6 ANNALS OF CONG. 1788 (considering two 1797 petitions seeking remission of penalties for “having sold wine and spirits by retail, without license”).

¹³² See Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 637 (1985).

¹³³ See Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1586-87 (2018).

¹³⁴ See MICHELE LANDIS DAUBER, *THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE* 1-16 (2013).

¹³⁵ See Maggie Blackhawk, *Equity Outside the Courts*, 121 COLUM. L. REV. 2037, 2042 (2020).

responding to individual petitions seeking legislative favor.¹³⁶ To that end, one of Congresses' very first acts was to develop a system for receiving and responding to petitions, which generally involved referral to a congressional committee or to an executive branch official.¹³⁷ The referee would investigate and prepare a report and recommendation; Congress would then decide whether to grant the requested relief, usually via private bill or resolution.¹³⁸

Hamilton's proposal, however, prompted Congress to divest itself entirely of responsibility for remitting fines and forfeitures. The challenge lay in reaching agreement as to whom Congress should give that power. Under the first remission bill introduced in the House, a panel of judicial officers—the local federal district judge, district attorney, and marshal—would handle petitions for relief.¹³⁹ A subsequent version of the bill gave the district judge alone the power to remit, though remission of a penalty greater than \$5,000 had to be approved by the Secretary of the Treasury, the Secretary of State, and the Attorney General.¹⁴⁰

When the Senate returned its amended version of the bill, however, the district judge's role was reduced to hearing evidence and transmitting a statement of facts to the same three cabinet officers, who then made the decision as to whether remission was warranted.¹⁴¹ The reasons for the change are not clear, though it appears that the Senate modeled its proposal on British practice, in which a central administrative board had the power to “relax” the revenue laws in “cases of hardship.”¹⁴² Hamilton himself suggested

¹³⁶ See McKinley, *supra* note ___, at 1576-77.

¹³⁷ See *id.* at 1586-87.

¹³⁸ *Id.*

¹³⁹ 1 ANNALS OF CONG. 1127.

¹⁴⁰ 6 DHFFC 1482.

¹⁴¹ 6 DHFFC 1485. Under the Senate proposal, only two of the three executive officers need to agree in order to grant remission. *Id.* An earlier proposal in the Senate envisioned a more complicated procedure, in which the district judge made the initial determination as to whether fraud was involved, then the three cabinet officials decided whether relief was warranted in light of the facts, and then the judge made the final decision as to the “reasonable” quantum of relief to be granted (but no greater than the amount approved by the executive officers). *Id.* at 1483 n.12.

¹⁴² 6 ANNALS OF CONG. 2286 (Ames); see also 1 ANNALS OF CONG. 1128 (Fitzsimons) (urging Congress to consider “the practice in England, where . . . application for relief is made to the commissioners”); *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 295 (1825) (“The powers given by this statute to the [British] Commissioners of the Treasury, are very analogous to those given by our act to the Secretary of the Treasury.”). By statute, British commissioners had broad authority to restore forfeited goods that “arose without any [d]esign or [i]ntention of [f]raud.” An Act for the More Effectual Prevention of Smuggling in this Kingdom 1787, 27 Geo. 3 c. 32, § 15 (UK).

as much in his initial recommendation: Creating a discretionary power to grant relief would align the U.S. with “the usual policy of commercial nations.”¹⁴³

Whatever its genesis, the Senate’s switch to centralized decisionmaking caused consternation in the House. Critics argued that delegating authority to executive officers in Philadelphia would delay needed relief for merchants located far from the seat of government.¹⁴⁴ The Senate proposal also gave the power to officials who were less “responsible” than local district judges.¹⁴⁵ In response, the amendment’s defenders conceded that the new proposal would “lengthen” the remission process.¹⁴⁶ But that was a necessary evil. Centralized decisionmaking was essential to ensuring that the laws governing maritime commerce were applied consistently and predictably; as one House member put, putting remission in the hands of the executive branch would “eventually produce strict justice, and tend more effectually to secure the revenue.”¹⁴⁷

Critics also questioned the amendment’s constitutionality. Specifically, two House members argued that the Senate’s proposal improperly granted “judiciary powers” to executive branch officials.¹⁴⁸ The precise basis for these objections is unclear,¹⁴⁹ but they may have had some traction. After debate on the Senate version of the bill, the House responded with a version that vested remission power in the individual justices of the Supreme Court.¹⁵⁰

For reasons unknown,¹⁵¹ the final version of the Act doubled down on its concentration of power in the executive branch, by giving it to the Treasury Secretary alone. Under the Act, the Secretary could remit any penalty incurred under the customs laws

¹⁴³ Saddler Report.

¹⁴⁴ 1 ANNALS OF CONG. 1475 (Goodhue).

¹⁴⁵ 1 ANNALS OF CONG. 1475 (Jackson).

¹⁴⁶ 1 ANNALS OF CONG. 1474 (Sherman).

¹⁴⁷ 1 ANNALS OF CONG. 1474 (Sherman).

¹⁴⁸ 1 ANNALS OF CONG. 1475 (Gerry); see also 1 ANNALS OF CONG. 1475 (Huntington) (the Senate bill “referr[ed] matters of judicial determination to a Chancellorate unknown to the Constitution”).

¹⁴⁹ Compare 1 ANNALS OF CONG. 1475 (Gerry) (suggesting that designating the heads of executive departments as “Judges” in deciding on remission petitions infringed on the President and Senate’s combined power to appoint federal judges), with 1 ANNALS OF CONG. 1475 (Sedgwick) (responding the Gerry’s objection by pointing out that the designated department heads had already been constitutionally appointed).

¹⁵⁰ 6 DHFFC 1488-89.

¹⁵¹ Remission Act of 1790, 1 Stat. 122, § 1. No explanation for the change is recorded in the published legislative record. I discuss the possibilities in Part IV.

if, “in his opinion,” the violation was committed “without wilful negligence or any intention of fraud.”¹⁵² The Secretary could remit the entire penalty, including the customs officers’ share—a power not included in the original House proposal. And most importantly, he could remit the whole penalty or “any part thereof . . . upon such terms or conditions as he may deem reasonable and just.”¹⁵³ In other words, once the Secretary determined, “in his opinion,” that a particular penalty had been incurred without fraudulent intent, he had complete discretion to restore to the petitioner as much or as little of his property as the Secretary thought reasonable. And it really was *complete* discretion. The Act did not provide for review of the Secretary’s decisions—not by the judiciary, not by the President, and not by Congress.¹⁵⁴ Federal judges were still involved in the process, but only to the extent that they heard evidence and transmitted a statement of facts to the Secretary.¹⁵⁵ The decision of whether to impose all, some, or none of the prescribed penalty lay entirely in the executive branch.

C. Affirming Remission

Hamilton and his successors did not hesitate to use the broad power Congress gave them. From 1791 to 1809, the Treasury Secretaries granted relief in over ninety percent of the remission cases presented to them. In most of those cases, they granted nearly complete relief, only withholding a small percentage of the penalty to pay for court costs. But in roughly a third of cases the Secretaries exercised their authority to grant whatever partial relief they deemed “just and reasonable.” The level of partial remission varied widely; in most cases the Secretaries remitted all but a small portion of the penalty, but in certain cases the government retained substantial sums.¹⁵⁶

Despite—or perhaps because of—the Secretaries’ willing exercise of their power, remission became more entrenched over the next decade. The 1790 Act was supposed to expire after a year.¹⁵⁷

¹⁵² Remission Act of 1790, 1 Stat. 122, § 1.

¹⁵³ Remission Act of 1790, 1 Stat. 122, § 1.

¹⁵⁴ See *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 285 (1825) (concluding that “no one can question” the Secretary’s determination regarding a petitioner’s fraudulent intent: “It is a subject committed to his sound discretion.”). I am aware of no court case involving a challenge to a remission decision by a disappointed petitioner. Cf. *Morris*, 23 U.S. (10 Wheat.) at 288-89 (rejecting customs officer’s challenge to the Act’s grant of authority to remit the portion of a fine or forfeiture due to the officer).

¹⁵⁵ See Arlyck, *supra* note __, at 1484 & n.212.

¹⁵⁶ See *id.* at 1487-88.

¹⁵⁷ Remission Act of 1790, 1 Stat. 122, § 2.

As a member of the House later explained, Congress included this sunset provision as a concession to those who had concerns about “the propriety of the law.”¹⁵⁸ Yet the legislature repeatedly reauthorized the remission statute in the 1790s,¹⁵⁹ and added parallel remission provisions to other laws related to revenue and commerce.¹⁶⁰

That said, when Congress sought to consolidate and expand the Treasury Secretary’s authority in 1797, a brief but sharp debate erupted over further extension of such broad and unreviewable authority.¹⁶¹ The legislation’s proponents leaned heavily on precedent. The new bill, they argued, largely confirmed the authority the Secretary had exercised from the days of the First Congress—and had exercised properly.¹⁶²

In response, critics acknowledged that the Secretary’s powers under the proposed bill were substantially the same as before. What they questioned was “the principle of the law.”¹⁶³ For the most part, they questioned whether it was a good idea to concentrate so much power in the hands of single individual.¹⁶⁴ Doing so gave him great “influence,” critics charged, which he might use for the benefit of the wealthy and powerful and to the detriment of the public interest.¹⁶⁵ This was especially true because the Secretary’s decision was wholly unreviewable; with no one to “call him to account,” nothing prevented him from exercising his discretionary authority in ways that favored a chosen few.¹⁶⁶

¹⁵⁸ 6 ANNALS OF CONG. 2287 (Coit).

¹⁵⁹ Act of Mar. 2, 1795, 1 Stat. 425, 425; Act of May 8, 1792, § 1, 1 Stat. 275, 275; Act of Mar. 3, 1791, § 1, 1 Stat. 218, 218.

¹⁶⁰ See, e.g., Act of March 3, 1791, § 43, 1 Stat. 199, 209 (power to remit fines and forfeitures incurred for violating act regulating distilled spirits); Embargo Act of 1799, § 6, 1 Stat. 61 (same for 1799 embargo against France).

¹⁶¹ In addition to remitting fines and forfeitures, the 1797 Act gave the Secretary the additional power to remit “disabilities”—for instance, if a ship was denied an American registry (entitling it to lower tonnage duties), the Secretary could order that it be provided one. See Act of Mar. 3, 1797, § 1, 1 Stat. 506, 506; 6 ANNALS OF CONG. 2285 (Sitgreaves) (1797 expansion of remission power was meant to include laws for registering and licensing vessels).

¹⁶² 6 ANNALS OF CONG. 2290, 2291 (Coit)

¹⁶³ 6 ANNALS OF CONG. 2285 (Livingston).

¹⁶⁴ See 6 ANNALS OF CONG. 2287 (W. Lyman) (the authority to remit all revenue-related penalties was a power “too great to be left to any one man”); id. 2287 (Swanwick) (“[T]he powers proposed to be placed in the Secretary of the Treasury were ... too large to be put in the hands of any one person.”); id. 2286 (Livingston) (similar).

¹⁶⁵ 6 ANNALS OF CONG. 2286 (Livingston).

¹⁶⁶ 6 ANNALS OF CONG. 2291 (Livingston).

Remission's most vocal critic, Edward Livingston, went further. In his view, the entire remission scheme was unconstitutional—because it delegated legislative authority to an executive branch officer. The power to remit penalties was originally “lodged” in the legislature, and Congress had no right to “delegate it to another.”¹⁶⁷ He flatly rejected the argument that delegation was needed to free the House from the burdensome responsibility of responding to individual petitions.¹⁶⁸ According to Livingston, their constituents had elected them precisely to attend to such matters. “Were they to get rid of this business, by throwing it upon their officers?,” he asked.¹⁶⁹ No—remission was “Legislative business” which “should not be transferred from [Congress’s] hands.”¹⁷⁰

Livingston's nondelegation critique was forceful, but it did not last long. Perhaps sensing that his colleagues did not share his constitutional scruples, he quickly switched gears. If the burden of responding to individual claims for relief was “too great [for] the Legislature,” then the better option would be for remission to be exercised by a multi-member “Board,” whose decisions would be subject to “appeal.”¹⁷¹ When the House decisively voted down that amendment, Livingston changed course again, arguing—rather incoherently—that the 1797 bill effectively gave the Treasury Secretary “the power to pardon crimes,” which the Constitution vested only in the President.¹⁷²

In the end, Livingston's constitutional and policy arguments failed to defeat the bill. He was not alone in his opposition—other members of the House voiced serious doubts, and the vote in favor of the bill was 50 to 34.¹⁷³ The vote was partisan, though not entirely so; of the yeas, 12 Republicans joined 38 Federalist colleagues in supporting the bill (only one Federalist voted in opposition). To

¹⁶⁷ 6 ANNALS OF CONG. 2285 (Livingston); see also 6 ANNALS OF CONG. 2286 (the remission bill “place[d] in the hands of the Secretary of the Treasury Legislative business”).

¹⁶⁸ 6 ANNALS OF CONG. 2285 (Livingston).

¹⁶⁹ 6 ANNALS OF CONG. 2285 (Livingston).

¹⁷⁰ 6 ANNALS OF CONG. 2287 (Livingston).

¹⁷¹ 6 ANNALS OF CONG. 2288-89 (Livingston). Specifically, Livingston proposed that the Vice-President, the Secretaries of State and Treasury, and the Attorney General collectively rule on remission, to guard against the pernicious effect that “influence” could have on one person. *Id.* Livingston did not specify to whom the board's decisions should be appealed.

¹⁷² 6 ANNALS OF CONG. 2290-91 (Livingston).

¹⁷³ 6 ANNALS OF CONG. 2287 (W. Lyman); 6 ANNALS OF CONG. 2287 (Swanwick); 6 ANNALS OF CONG. 2292 (Nicholas); 6 ANNALS OF CONG. 2292 (vote).

mollify the objectors' concerns, the act was set to expire in 1801.¹⁷⁴ But in 1800 Congress made the Remission Act permanent.¹⁷⁵ Moreover, in future years, Republican-controlled Congresses included parallel remission provisions in other statutes.¹⁷⁶

Ironically, the person most affected by Congress's steady expansion of the remission power was one of the 1797 Act's opponents, Albert Gallatin. As a first-term representative from western Pennsylvania, Gallatin voted against the bill.¹⁷⁷ Though his reasons for opposing it are unknown, a year later Gallatin argued (unsuccessfully) that a bill giving the President broad discretion to raise a provisional army of up to 20,000 troops was an unconstitutional delegation of legislative authority to the executive branch.¹⁷⁸ Yet when the Jeffersonian Republicans swept into power in 1800 and Gallatin became Treasury Secretary, he used the remission authority as extensively as his Federalist predecessors.¹⁷⁹ Indeed, when a Federalist member of Congress accused Gallatin of not granting relief generously enough during the War of 1812, an investigating House committee concluded that he had exercised the remission authority in a manner both "liberal" and "just."¹⁸⁰

D. *Remission and Discretion*

To recap: Less than a year after the Constitution's ratification, Congress delegated, to a single executive branch official, broad and wholly unreviewable authority to modify penalties the legislature had designated for violations of critically important federal law, in whatever way the official deemed "reasonable and just" (including imposing no penalty at all).¹⁸¹ The power delegated was a core

¹⁷⁴ Remission Act of 1797, ch. 13, § 4, 1 Stat. 506, 507 (continuing remission power through the end of the next session of Congress); 6 ANNALS OF CONG. 2288 (Swanwick) (the sunset provision was "was the only thing which would make [the bill] in any degree palatable").

¹⁷⁵ Act of Feb. 11, 1800, ch. 6, 2 Stat. 7, 7 (extending remission power "without limitation of time").

¹⁷⁶ See, e.g., Act of Feb. 27, 1813, ch. 33, § 1, 2 Stat. 804, 805 (authorizing remission of "all fines, penalties, and forfeitures" incurred under the Jeffersonian embargo laws); Act of Jan. 9, 1808, § 6, 2 Stat. 453, 454 (power to remit fines and forfeitures incurred for violating embargo act).

¹⁷⁷ 6 ANNALS OF CONG. 2292.

¹⁷⁸ See 8 ANNALS OF CONG. 1538; Mortenson & Bagley, *supra* note __, at 103-04.

¹⁷⁹ See Arlyck, *supra* note __, at 1488 & n.228.

¹⁸⁰ 25 ANNALS OF CONG. app. at 1282 (1813).

¹⁸¹ There is no indication that the term "reasonable and just" was a legal term of art with a specific meaning the Secretary could readily apply to a particular set of facts. See Parrillo, *Critical Assessment*, *supra* note __, at 53-54 (phrase "just and equitable" was not a term of art in the late 18th century); *American Railroads*, 575 U.S. at 80 (Thomas, J., concurring

legislative power—the legislature’s traditional authority to waive enforcement of the laws it had enacted, in response to individual petitions for relief.¹⁸² Congress made—and repeatedly affirmed—this delegation despite the acknowledged importance of exercising this power carefully,¹⁸³ in the face of serious concerns about the wisdom of concentrating too much power in the hands of an unaccountable government officer,¹⁸⁴ and over objections that it was constitutionally impermissible for the legislature to do so.¹⁸⁵

To appreciate the breadth of the delegation Congress made in the Remission Act, we can compare it to the statute that Justice Gorsuch found so objectionable in *Gundy*. The Sex Offender Registration and Notification Act (SORNA) requires individuals convicted of a sex offense to register in a national system, and sets forth the registration requirements they must fulfill.¹⁸⁶ Yet the statute gives the Attorney General authority to decide which requirements apply to individuals convicted prior to SORNA’s enactment.¹⁸⁷ Justice Gorsuch complained that this discretion effectively empowered the nation’s chief law enforcement officer “to write his own criminal code” governing numerous citizens.¹⁸⁸ Making matters worse, the Secretary was “free to change his mind at any point” about which requirements to impose on offenders.¹⁸⁹

The discretion Congress afforded the Treasury Secretary in 1790 was remarkably similar. Like the Attorney General under SORNA, the Secretary had free reign to decide the extent to which statutory provisions would apply to those who violated the law. The Secretary was “free to change his mind at any point” about what penalties to impose on offenders.¹⁹⁰ In fact, unlike the Attorney General, the Secretary could change his approach on a case-by-case basis.¹⁹¹ And he similarly made such decisions with zero guidance

in the judgment) (suggesting that application of the terms “unequal” and “unreasonable” “could be said to call for the President to exercise policy judgment”).

¹⁸² See *supra* Part II.B.

¹⁸³ See *supra* Part II.A.

¹⁸⁴ See *supra* Part II.B.

¹⁸⁵ See *supra* Part II.C.

¹⁸⁶ *Gundy*, 139 S.Ct. at 2122 (plurality opinion).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 2131 (Gorsuch, J., dissenting).

¹⁸⁹ *Id.* at 2143 (Gorsuch, J., dissenting).

¹⁹⁰ *Id.*

¹⁹¹ In practice, it appears that the early Treasury Secretaries may have been more consistent in their approach to remission than the Attorneys General were regarding the application of SORNA’s registration requirements. Compare Arlyck, *supra* note ___, at 1487-89 (describing broadly consistent rates of remission across two decades), with *Gundy*, 139

from Congress as to what portion of a penalty to remit, other than whatever amount he deemed “reasonable and just.”¹⁹²

To be sure, the Secretary’s discretion under the Remission Act was not entirely unbounded. But the same is true of the Attorney General under SORNA. The Secretary could only grant remission to a congressionally-defined subset of offenders—those who had acted with no fraudulent intent. SORNA similarly gives the Attorney General discretion only with respect to pre-Act offenders.¹⁹³ Under the Remission Act, the Secretary could only choose a penalty within the statutory limits set by Congress. That is just like what Justice Gorsuch found so objectionable in SORNA; it allows the Attorney General to impose on pre-Act offenders “all of the statute’s requirements, some of them, or none of them.”¹⁹⁴ Finally, the Secretary had to grant remission that was, in his view, “reasonable and just.” Though SORNA’s text includes no like qualifier, Justice Gorsuch rejected the argument that a similarly vague limitation would render SORNA’s delegation permissible.¹⁹⁵

To be sure, SORNA and the Remission Act are not identical.¹⁹⁶ But the nondelegation “alarms” that Justice Gorsuch thinks SORNA rings so loudly are likewise present in the Remission Act. As in 2006, in 1790 Congress effectively gave the Cabinet officer with primary responsibility for law enforcement “the power to write a

S.Ct. at 2132 (Gorsuch, J., dissenting) (detailing post-SORNA shifts in Attorney General policy). But the possibility that the Treasury Secretaries happened to exercise their discretion more consistently does not make the initial delegation any less capacious.

¹⁹² See *Gundy*, 139 S.Ct. at 2143 (Gorsuch, J., dissenting) (“In the end, there isn’t a single policy decision concerning pre-Act offenders on which Congress even tried to speak”).

¹⁹³ 34 U.S.C. § 20913(d).

¹⁹⁴ *Gundy*, 139 S.Ct. at 2143 (Gorsuch, J., dissenting); see also Rappaport, *supra* note __, at 317-18 (arguing that “permissive” appropriations violate the nondelegation doctrine).

¹⁹⁵ See *Gundy*, 139 S.Ct. at 2145 (Gorsuch, J., dissenting) (arguing that the plurality’s inferred statutory command to register pre-Act offenders “to the maximum extent feasible” had “many possible meanings,” and thus left the Attorney General “free to make all the important policy decisions”); cf. also Lawson, *Original Meaning*, *supra* note __, at 340 (describing a hypothetical statutory command to “promote goodness and niceness” as being “so vacuous that any attempt to implement this law would amount to creation of a new law”).

¹⁹⁶ One difference is that the Remission Act delegated authority over penalties, while SORNA grants discretion regarding substantive liability (i.e., the registration requirements applicable to pre-SORNA offenders). But nothing in Justice Gorsuch’s *Gundy* opinion suggests that a delegation of authority to rewrite the penalties that attach to a statutory violation would be constitutionally permissible. See *Gundy*, 139 S.Ct. at 2144-45 (Gorsuch, J., dissenting) (“To allow the nation’s chief law enforcement officer to write the criminal laws he is charged with enforcing ... would be to mark the end of any meaningful enforcement of our separation of powers”).

criminal code rife with his own policy choices.”¹⁹⁷ In other words, immediately after ratification Congress conferred on the Treasury Secretary a quantum of legislative authority similar in scope to a modern power that at least three justices of the current Supreme Court believe patently violates an originalist understanding of nondelegation. Accordingly, if the Remission Act is to be found compatible with an originalist argument in favor of strict limits on Congress’s power to delegate, the explanation must lie elsewhere.

III. JUSTIFYING DELEGATION

If the remission power Congress conferred on the Treasury Secretary in 1790 looks like a blatant violation of the nondelegation principle advanced by present-day originalists, is there some way to explain it? Viewing the Remission Act through the prism of various theories that nondelegationists have developed to explain early delegations more generally, several possibilities arise. One is that Congress did not actually grant the Secretary legislative authority, or at least not legislative authority that only Congress can exercise. Instead, it gave him a sort of judicial power, or it merely confirmed a power the executive branch already enjoyed (albeit in different form).¹⁹⁸ A second possibility is that the Remission Act was a delegation of legislative authority, but a *permissible* one—either because it came under a particular subject-matter “exception” to general nondelegation principles, or because it wasn’t a sufficiently significant delegation to pose a constitutional problem.¹⁹⁹

As this Part demonstrates, none of these explanations are fully satisfactory. Remission certainly resembles traditional exercises of judicial or executive authority (like prosecutorial discretion or pardon). And if one squints hard enough, remission might qualify as permissible exercise of legislative power under one exception or another. But in truth the Remission Act does not fit comfortably into any of these categories. The Treasury Secretary’s authority was meaningfully different from typical judicial or executive power, and does not qualify as an exception.

More importantly, no one at the Founding justified remission on any of these grounds. Indeed, as this Part shows, there is almost no evidence that members of the Founding generation thought about—let alone justified—early delegations in these terms.²⁰⁰ This

¹⁹⁷ Id. at 2144 (Gorsuch, J., dissenting).

¹⁹⁸ See *infra* Part III.A.

¹⁹⁹ See *infra* Part III.B.

²⁰⁰ See *infra* Part III.B.

is a crucial point, for if contemporaries did not distinguish between lawful and unlawful delegations in these ways, then it is difficult (perhaps impossible) to reconcile a number of important early delegations with a stringent original understanding of nondelegation. In other words, the Remission Act is just one of many Founding-era delegations that instead point to a permissive original understanding of Congress’s authority to grant legislative power to the executive branch.

A. *Delegation of Nonlegislative Power*

One way to explain the Remission Act is to consider it as an exercise of nonlegislative power. Depending on how one frames what the Remission Act authorized the Treasury Secretary to do, he might have been exercising either judicial or executive authority. As explained in this subpart, remission was sufficiently different from typical exercises of judicial or executive authority that it cannot easily be explained as either. And save for one fleeting exception discussed below, no one in Congress defended the Remission Act’s constitutionality on the ground that it delegated judicial or executive power (in fact, remission’s resemblance to judicial power was an argument for its *unconstitutionality*).

Of course, the most important reason to doubt that remission was an exercise of judicial or executive power is that, at the Founding, it was indisputably a form of legislative authority. Recall that both before and after passage of the 1790 Act, remission was exercised in the first instance *by the legislature*.²⁰¹ Indeed, as discussed in Part IV, Congress repeatedly extended the Act in no small part because it wanted to divest itself of the responsibility of deciding such petitions.²⁰² To be sure, the legislative power to grant relief from undeserved penalties may not have been precisely the *same* power as the authority to enact prospective legislation.²⁰³ But if equity is now generally associated with courts, the early Congresses routinely exercised this sort of authority—primarily through the petitioning process.²⁰⁴ Whether they supported the Act

²⁰¹ See *supra* Part II.B.

²⁰² See *infra* Part IV.A.

²⁰³ See 6 ANNALS OF CONG. 2288 (Ames) (likening remission to a sort of “chancery power”). But equity is now generally associated with courts, the early Congresses routinely exercised this sort of power—primarily through the petitioning process. See Blackhawk, *supra* note __.

²⁰⁴ See Blackhawk, *supra* note __. Indeed, one of the early Congresses’ most important functions was responding to individual petitions seeking legislative favor, and often responded through private bills—i.e., through legislation. See McKinley, *supra* note __, at

or opposed it, members of Congress recognized that they had “transferred” to the Secretary their collective authority to adjust statutory penalties in individual cases as they saw fit.²⁰⁵

1. *Judicial Power*

Even if the Remission Act delegated authority exercised by Congress in the first instance, could it have passed constitutional muster because remission mimicked an exercise of judicial power? After all, the Act required the Treasury Secretary to apply a legal standard (set by Congress) to particular facts.²⁰⁶ Before granting remission, the Secretary had to conclude that the statutory violation at issue occurred without fraudulent intent.²⁰⁷ The Act granted the Secretary discretion in imposing a penalty for lawbreaking, a power federal courts traditionally enjoyed (at least until the advent of the federal sentencing guidelines).²⁰⁸ Moreover, in practice the early remission process was an alternative forum to the courts for determining what penalties would attached to violations of the customs laws.²⁰⁹ This resemblance is perhaps why two members of Congress suggested in 1790 that the Act granted “judiciary powers” to executive branch officials.²¹⁰

1576-77 (until the mid-twentieth century, “private bills” were a primary “means of resolving petitions for private claims”).

²⁰⁵ 6 ANNALS OF CONG. 2287 (Livingston); see also 6 ANNALS OF CONG. 2286 (Ames) (the “delicate power” of remission was “better placed in one of our Executive Officers . . . than that House should exercise it”). To be sure, the legislative power to grant relief from undeserved penalties may not have been precisely the *same* power as the authority to enact prospective legislation. See 6 ANNALS OF CONG. 2288 (Ames) (likening remission to a sort of “chancery power”). But if equity is now generally associated with courts, the early Congresses routinely exercised this sort of power—primarily through the petitioning process. See Blackhawk, *supra* note __. Indeed, one of the early Congresses’ most important functions was responding to individual petitions seeking legislative favor, and often responded through private bills—i.e., through legislation. See McKinley, *supra* note __, at 1576-77 (until the mid-twentieth century, “private bills” were a primary “means of resolving petitions for private claims”).

²⁰⁶ See *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 280 (1855) (stating that any administrative duty involving the application of law to fact can be understood as “a judicial act”). Some nondelegationists suggest that applying law to fact may also be an executive act. See Gordon, *supra* note __, at 755; Lawson, *Original Meaning*, *supra* note __, at 364.

²⁰⁷ Remission Act of 1790, §1, 1 Stat. 122, 123.

²⁰⁸ See *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

²⁰⁹ See Arlyck, *supra* note __, at 1485-86. For example, claimants defending against a government forfeiture suit filed a remission petition with the court, which stayed its proceedings until the Treasury Secretary ruled on the petition. *Id.* And the remission process itself had some of the trappings of proceedings in court. *Id.*

²¹⁰ 1 ANNALS OF CONG. 1475 (Gerry); see also 1 ANNALS OF CONG. 1475 (Huntington) (the Senate bill “referr[ed] matters of judicial determination to a Chancellorate unknown to the Constitution”).

Yet there is no indication that this similarity is what persuaded the early Congress that the Remission Act was constitutionally permissible. Indeed, for the 1790 critics, bestowing “judiciary powers” on executive branch officials rendered remission *unconstitutional*.²¹¹ And while the historical limits on Congress’s ability to grant adjudicatory authority to non-Article III tribunals are notoriously murky,²¹² the Remission Act might very well have transgressed them.²¹³

Accordingly, the fact that the Act passed—repeatedly—suggests that members of Congress did not believe that remission was judicial power. For good reason. Notably, remission could operate before or after judgment in federal district court.²¹⁴ In addition, the Treasury Secretary did not decide liability. Though the final version of the Act did not require a formal confession of judgment by the petitioner, it “presuppose[d]” that an offense had been committed, and provided an avenue for relief for the innocent after.²¹⁵ This is likely why the Act’s fiercest critic, Edward Livingston, rejected the analogy to judicial power in 1797, and the possibility never again seemed to trouble the early Congress.²¹⁶

Even if remission was not conceptually part of the “judicial power” at the Founding, could its adjudicatory *qualities* nonetheless explain why the Act did not offend nondelegation principles? In *Gundy*, Justice Gorsuch characterized nondelegation as a constitutional prohibition on delegations of power to establish “generally applicable rules” governing “future actions.”²¹⁷

²¹¹ See *supra* notes ___ to ___.

²¹² See William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1513 (2020) (“[T]he internal logic of this longstanding practice is itself obscure and mysterious.”).

²¹³ Some scholars—and the Supreme Court—suggest that Congress can delegate judicial power over “public rights,” but not “private rights.” See, e.g., *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S.Ct. 1365 (2018); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007). Categorizing a delegation as involving a public or private right is often challenging, see *Oil States*, 138 S.Ct. at 1373, but, as discussed below, see *infra* Part III.B.2, remission is best understood as involving the latter, see Nelson, *supra*, at 563 (“[O]nly entities with judicial power [could] authoritatively declare the loss of an individual’s core ‘private rights’ to life, liberty, or property.”).

²¹⁴ *United States v. Morris*, 23 U.S. 246, 287 (1825); *Power of the Exec. to Remit Forfeitures*, 4 U.S. Op. Atty. Gen. 573, 574 (1847).

²¹⁵ *United States v. Morris*, 23 U.S. 246, 291 (1825).

²¹⁶ See 6 ANNALS OF CONG. 2287 (Livingston) (concluding that the power granted the Treasury Secretary was “not ... of a judicial nature”).

²¹⁷ *Gundy*, 139 S.Ct. at 2133 (Gorsuch, J., dissenting); see also *American Railroads*, 757 U.S. at 70 (Thomas, J., concurring in the judgment) (an originalist reading of the

Presumably what Justice Gorsuch had in mind is the sort of formal rulemaking authority one associates with modern administrative agencies—the kind of authority at issue in *Gundy* itself.²¹⁸ In contrast, remission decisions were individualized and retrospective. So even if the Treasury Secretary’s remission power derived from Congress, perhaps the Constitution permits delegation of case-by-case adjudicatory authority.

A distinction between adjudication and rulemaking cannot be what spared the Remission Act from invalidation on nondelegation grounds. For starters, while the Secretaries’ remission decisions were not “rules” in the formal sense, they *did* operate generally and prospectively. The Secretaries applied general rules across cases,²¹⁹ and appeared to treat past decisions as precedent to follow when ruling on future petitions.²²⁰ Remission decisions were not formally made public, but it appears that members of the merchant community learned about them, and shaped their behavior accordingly.²²¹ To be sure, the guidance that the Secretaries and the public took from past decisions were not administrative “rules” in the modern sense—binding regulations subject to the notice and comment procedures of the Administrative Procedure Act.²²² But as a form of “adjudicatory precedent” they prospectively seem to have

Constitution prohibits Congress from giving the executive branch “the discretion to formulate generally applicable rules of private conduct”).

²¹⁸ See 34 U.S.C. §§ 20913(d) (granting the Attorney General “to prescribe rules for ... registration”).

²¹⁹ For example, even when granting complete remission, the Secretaries invariably withheld a small portion of the penalty to cover court costs, except in rare cases of “great hardship.” 25 ANNALS OF CONG. app. at 1286. In other words, the Secretaries adopted and consistently applied a rule—mandatory payment of court costs, except in hardship cases—that was not in the Remission Act itself.

²²⁰ When he went to western Pennsylvania in 1794 to help put down the Whiskey Rebellion, Hamilton worried that there was not enough time to explain to Oliver Wolcott (then his second-in-command) “the principles which have governed [remission] in the past.” So he told Wolcott to decide difficult cases by “consulting the most recent precedents.” From Alexander Hamilton to Oliver Wolcott, Junior, 29 September 1794, <https://founders.archives.gov/documents/Hamilton/01-17-02-0263>; see also id. (noting the “course of policy” Hamilton had taken with respect to remissions).

²²¹ See Letter from Alexander Campbell to William Heth (Nov. 1, 1792) (enclosed in Letter from William Heth to Alexander Hamilton (Nov. 19, 1792)), in 13 The Papers of Alexander Hamilton 163, 164 (Harold C. Syrett ed., digital ed. 2011) (federal district attorney complaining that local merchants viewed Hamilton’s generous approach to remission as a license to ignore the customs laws).

²²² See generally 5 U.S.C. § 553. This formulation of course vastly oversimplifies the ways in which administrative agencies can articulate “rules” governing private conduct. See Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1466-69 (1992) (describing four types of administrative rulemaking, not all of which involve notice-and-comment).

shaped the future conduct of both the government and private parties.²²³

More importantly, a deficit of rule-like qualities cannot be what exempts remission from scrutiny on nondelegation grounds. Whether by formal regulations or individual determinations, the Treasury Secretary regulated private conduct based on nothing more than his opinion about what quantum of penalty a petitioner should pay.²²⁴ If anything, executive branch power to alter legislatively-prescribed penalties on a case-by-case basis should be *more* troubling than the power to adjust them prospectively via general rules. The latter, at least, provides “fair warning” to regulated parties regarding the legal consequences of their conduct.²²⁵ This may be why a nondelegationist like Justice Thomas believes that “ad hoc” executive decisions “based on a policy judgment” violate the nondelegation doctrine as much as prospective regulations,²²⁶ and why James Madison attacked a 1798 delegation of adjudicatory authority to the President on nondelegation grounds.²²⁷ However

²²³ See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (administrative agencies have the choice to establish rules “by general rule or by individual, ad hoc litigation”); Strauss, *supra* note __, at 1473 (“adjudicatory precedent” establishes principles “to which the public may be held unless the agency is persuaded not to apply it”). For a recent overview of the variety of forms of administrative agency adjudication, see generally Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141 (2019).

²²⁴ *Gundy*, 139 S.Ct. at 2144 (Gorsuch, J., dissenting) (critiquing SORNA giving the Attorney General “the power to write a criminal code rife with his own policy choices”).

²²⁵ See *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964) (under the Due Process Clause, “a criminal statute must give fair warning of the conduct that it makes a crime”); Eric A. Posner, *Balance-of-Powers Arguments, the Structural Constitution, and the Problem of Executive “Underenforcement,”* 164 U. Pa. L. Rev. 1677, 1712 (2016) (“Categorical pronouncements have frequently been used to direct executive branch subordinates, and they provide greater transparency, predictability, and guidance than case-by-case delegation does.”).

²²⁶ *American Railroads*, 575 U.S. at 80 (Thomas, J., concurring in the judgment); see *Mahler v. Eby*, 264 U.S. 32, 40 (1924) (rejecting a nondelegation challenge to the Secretary of Labor’s adjudicatory authority to deport aliens the Secretary found, “after hearing,” to be “undesirable residents of the United States”). Nondelegationist scholars seem to agree. For example, the Patent Act of 1790 gave the Secretary of State, the Secretary of War, and the Attorney General the power to grant patents to any new invention those officers deemed “sufficiently useful or important.” See Mortenson & Bagley, *supra* note __, at 75-76; see generally *infra* Part IV.B. Nondelegationists justify this broad delegation of authority on grounds other than its adjudicatory qualities. See Wurman, *supra* note __, at 52 (arguing that the Patent Act was consistent with nondelegation principles because it “surely addressed most” of the important issues the Act implicated); Gordon, *supra* note __, at 795-98 (arguing—incorrectly—that the Act was modified in response to nondelegation objections).

²²⁷ The Alien Act of 1798 empowered the president to deport individual aliens “he shall judge dangerous to the peace and safety of the United States.” An Act Concerning Aliens, 1 Stat. 570-71 (1798). Madison argued that the statute was unconstitutional in part because it lacked “any precise rules” cabining the president’s discretion. James Madison, Report of

much remission resembled an exercise of judicial authority, that is not the reason it survived constitutional scrutiny.

2. *Executive Power*

If an analogy to judicial authority does not explain why the Remission Act passed constitutional muster, might its similarity to familiar species of executive authority provide the answer? Remission looks like prosecutorial discretion or the pardon power—executive acts that affect legal liability but have never been understood to violate nondelegation principles. In that sense, the remission power might be seen as a “nonexclusive” legislative power—one that Congress can exercise itself *or* can delegate to the executive branch,²²⁸ perhaps because it is akin to other powers the Constitution vests in the executive branch.²²⁹

These explanations for the Remission Act fail for reasons similar to the analogy to judicial authority. First, despite the similarities, no one at the Founding justified remission on these bases. Second, remission was different from both prosecutorial discretion and the pardon power in meaningful ways.

Take prosecutorial discretion. As Gary Lawson has suggested, remission looks a lot like executive authority not to seek penalties for lawbreaking.²³⁰ Though the timing is different, the effect is functionally the same. And as discussed below,²³¹ there is evidence suggesting that some members of Congress saw the Remission Act as a means of centralizing law enforcement discretion in a single person, rather than allow front-line officers to use it in potentially inconsistent or even corrupt ways.²³² In fact, the Act itself expressly

the Committee to Whom Were Referred the Communications of Various States, Relative to the Resolutions of the Last General Assembly of this State, Concerning the Alien and Sedition Laws (1799).

²²⁸ See Wurman, *supra* note __, at 38-44 (discussing the distinction between exclusive and nonexclusive legislative powers). I address Wurman’s distinction in Part III.B.3, *infra*.

²²⁹ See U.S. Const., Art. II, § 2 (granting the President the power “to grant reprieves and pardons for offenses against the United States”); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“[T]he decision of a prosecutor in the Executive Branch not to indict [is] a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”).

²³⁰ Lawson, *Original Meaning*, *supra* note __, at 401.

²³¹ See *infra* notes __ to __ and accompanying text.

²³² See 6 ANNALS OF CONG. 2286 (Ames) (giving the Secretary authority to relax application of “strict rules” was preferable to making them “loosely” and giving “considerable discretion to the officers in the[ir] execution”); 6 ANNALS OF CONG. 2291 (Coit) (“It was made the duty of officers to prosecute in all cases, and it was necessary, therefore, in some to remit the fines.”).

granted the Treasury Secretary the power both to remit penalties incurred and to “discontinue[]” prosecutions.²³³ Perhaps remission therefore poses no delegation problem because it was, as Lawson argues, merely “a routine part of the executive function.”²³⁴

Or consider another possibility—that remission was simply an instantiation of the pardon power.²³⁵ This theory also has intuitive appeal, given that remission operated as a form of forgiveness for legal liability already “incurred” (though not yet formally adjudicated).²³⁶ Perhaps this is why Joseph Story, in his famous *Commentaries* of 1833, stated in passing that “remission of fines, penalties, and forfeitures” was “included” in the pardon power, whether exercised by the President directly or “confided to the treasury department” by statute.²³⁷ Though Story wrote more than four decades after Ratification, perhaps his intuition was correct.

Of course, if the Remission Act merely affirmed a power the executive already enjoyed, one imagines the Act’s Founding-era defenders would have made that argument in response to constitutional doubts. With perhaps one fleeting exception,²³⁸ they did not. As discussed in Part IV, remission proponents largely justified the Act on functional grounds.²³⁹ In fact, for Edward Livingston, an analogy between remission and the pardon power provoked constitutional difficulties, rather than resolve them.²⁴⁰

²³³ Remission Act of 1790, § 1, 1 Stat. 122.

²³⁴ Lawson, *Original Meaning*, supra note __, at 401; see also *Reynolds v. United States*, 565 U.S. 432, 450 (2012) (Scalia, J., dissenting) (“giv[ing] the Attorney General the power to reduce congressionally imposed requirements” would not pose a nondelegation question because “such a power is little more than a formalized version of the time-honored practice of prosecutorial discretion”).

²³⁵ See Gordon, supra note __, at 793 (“[R]emission of fines may also be viewed as incidental to the pardon power”).

²³⁶ Remission Act of 1790, 1 Stat. 122; see also *United States v. Morris*, 23 U.S. 246, 291 (1825) (the Remission Act “presupposes[] that the offence has been committed,” and simply “affords relief for ... unintentional error”).

²³⁷ JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 353-54 (1833); see also WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 177 (1829) (“The remission of fines, penalties, and forfeitures, under the revenue laws, is included in [the pardon power].”).

²³⁸ At one point in the 1797 debate the Act’s most vocal proponent, Fisher Ames, described remission in passing as “Executive business,” 6 ANNALS OF CONG. 2286 (Ames), though did not pursue that argument and focused his defense on functional considerations, *id.* 2288.

²³⁹ See supra Part IV.

²⁴⁰ In the 1797 debates Livingston complained (albeit incoherently) that remission effectively gave the Treasury Secretary the power to pardon crimes. See 6 ANNALS OF CONG. 2290 (Livingston). As others observed, the Constitution reserved this power for the President alone. See 6 ANNALS OF CONG. 2292 (Nicholas).

This may be why Congress in 1791 expressly disclaimed that remission affected the President's pardon power.²⁴¹ It is of course possible that the members of Congress who consistently voted in favor of remission did so because they secretly thought it was a power the executive branch already enjoyed. But the historical record gives us no indication this was so.

Moreover, there is a better explanation for why no one at the Founding justified remission as an aspect of enforcement discretion or the pardon power: Remission was different from both. For example, under the Remission Act, the Secretary could remit an *entire* forfeiture or fine, including the half share to which customs officers were statutorily entitled. That was something that contemporaries agreed the President could not do via pardon,²⁴² likely because pardons could not infringe on private rights vested by statute.²⁴³ As a result, if Story was suggesting that remission derived from the pardon power, he was simply wrong.

Remission also does not fit comfortably under the rubric of enforcement discretion, though here the distinctions are admittedly finer. First, such discretion is limited by the policy choices Congress has already made. Prosecutors can choose from a limited menu of charging options, or they can decide not to charge at all. But they cannot invent new prohibitions and penalties, and then impose them.²⁴⁴ In contrast, the remission power gave the Treasury

²⁴¹ See Act of March 3, 1791, § 3, 1 Stat. 218 (“[N]othing in the said act shall be construed to limit or restrain the power of the President of the United States, to grant pardons for offences against the United States.”).

²⁴² This was the conclusion reached by Richard Harison in 1791, Hamilton's close friend and the federal district attorney for New York. To Alexander Hamilton from Richard Harison, 24 May 1791, <https://founders.archives.gov/documents/Hamilton/01-08-02-0326>. Though Harison was not “assured” that he was correct, *id.*, the Washington Administration apparently adhered to his view, see To George Washington from Alexander Hamilton, 9 June 1794, <https://founders.archives.gov/documents/Washington/05-16-02-0167> (recommending a pardon for a customs infraction, “which would operate to remit one half the penalty incurred”). So did later administrations. See *Power of the Executive to Remit Forfeitures*, 4 U.S. Op. Atty. Gen. 573, 576–77 (1847) (unlike remission, the pardon power does not extend to officer's share of a forfeiture).

²⁴³ See Nelson, *supra* note __, at 568 (discussing the nineteenth century view that a pardon cannot “release and acquit ... private rights.”) (quoting *Passenger Laws-Pardoning Power*, 6 Op. Att'y Gen. 393, 403 (1854)).

²⁴⁴ The same is arguably not true for enforcement discretion's cousin, settlement authority. At least when it comes to civil penalties, the government and the defendants can agree to any punishment within statutory and regulatory limits. See, e.g., Joseph A. Grundfest, *Fair or Foul?: Sec Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 *FORDHAM L. REV.* 1143, 1181 (2016) (“The vast majority of SEC enforcement actions ... are settled simultaneously with the initiation of the action.”). And government agencies can seek and impose such penalties via administrative proceedings, rather than in court. See *id.* at 1145 (discussing SEC administrative proceedings). Of course, originalist-minded critics of the administrative state are no more comfortable with

Secretary discretion to decide what penalty was “reasonable and just,” subject only to a statutory cap that was often quite high. The Secretary did not simply choose among fixed legislative options; he made a policy decision about what punishment fit the crime.²⁴⁵ The distinction between a limited menu and a blank check is important, as it may be what reconciles a strong version of nondelegation with historical toleration of executive enforcement discretion.²⁴⁶ It is the delegated power to *make* rules, rather than simply choose among them, that offends nondelegation principles.

Second, unlike garden-variety prosecutorial discretion, remission was binding on the government. Ordinarily, the choice not to enforce the law does not bar later enforcement for the same violation (perhaps by a successor administration).²⁴⁷ In contrast, a grant of remission permanently foreclosed the government’s ability to impose a penalty for the violation in question. This distinction also seems important, at least for nondelegationists who suggest that enforcement discretion is constitutionally tolerable because it does not alter the regulated party’s underlying legal liability.²⁴⁸ Accordingly, the Remission Act should trouble nondelegationists

this state of affairs than they are with a permissive nondelegation doctrine. See, e.g., HAMBURGER, *UNLAWFUL*, supra note __, at 227 (“[A]dministrative adjudication dangerously restores an extralegal judicial regime.”)

²⁴⁵ Notably, early Congresses demonstrated that they knew how to limit the Treasury Secretary’s discretion when it wanted to. See Act of Feb. 27, 1813, § 1, 2 Stat. 804, 805 (“direct[ing]” the Secretary to remit “all fines, penalties, and forfeitures” incurred under various embargo acts, if the imported goods were American property and properly reported).

²⁴⁶ Gary Lawson suggests as much. In his view, “[t]he executive department always has prosecutorial discretion to decide ... what levels and kinds of *statutorily-permitted* penalties to seek.” Lawson, *Original Meaning*, supra note __, at 401 (emphasis added); see also *Reynolds v. United States*, 565 U.S. 432, 448-50 (2012) (Scalia, J., dissenting) (stating that a hypothetical version of SORNA that imposed all registration requirements but granted the Attorney General discretion to make case-by-case exceptions would be acceptable as “a formalized version of the time-honored practice of prosecutorial discretion”); cf. *United States v. Batchelder*, 442 U.S. 114, 125-26 (1979) (once Congress has “demarcate[d] the range of penalties that prosecutors and judges may seek and impose,” it has “fulfilled its duty,” and the power it has delegated to executive branch officials “is no broader than the authority they routinely exercise in enforcing the criminal laws”). In his brief discussion of remission, Lawson does not recognize that the Treasury Secretary could do more than simply choose among congressionally-mandated penalties.

²⁴⁷ In certain cases, nonenforcement will be made effectively permanent through the operation of an outside force; for example, if the statute of limitations runs in the interim, or if the government pledges not to enforce the law against someone in the future through a non-prosecution agreement.

²⁴⁸ See Gordon, supra note __, at 808 ; HAMBURGER, *UNLAWFUL*, supra note __, at 122 .

even if they think ordinary enforcement discretion poses no constitutional problem.²⁴⁹

To be sure, the Treasury Secretary's power under the Remission Act is close enough to enforcement discretion that this broad delegation might feel intuitively unobjectionable to modern commentators. But members of the Founding generation did not justify remission on such grounds. It was a legislative power that Congress could apparently grant freely. Accordingly, from an originalist perspective, the Remission Act's constitutionality must be explained some other way.

B. Permissible Delegation of Legislative Power

Perhaps instead of viewing remission as a nonlegislative power, it was a legislative power that Congress could delegate, but only because it qualified under one of several "exceptions" to delegation. To be clear, there is no record of anyone in the Founding era suggesting that remission was justifiable on such grounds, and no nondelegationist argues that now. But the idea is worth exploring nonetheless, for if the exceptions cited by nondelegationists are a modern invention—as the historical evidence strongly suggests—then several *additional* Founding-era statutes also cannot be reconciled with a stringent version of the nondelegation doctrine.

1. Foreign Affairs

It is common currency among nondelegationists that there was an exception to nondelegation for grants of discretionary authority touching on military affairs and foreign relations.²⁵⁰ For good reason; without such an exception, nondelegationists find it difficult—perhaps impossible—to explain several significant Founding-era delegations of legislative authority to the executive branch.²⁵¹ Accordingly, they have invoked the exception to justify

²⁴⁹ See HAMBURGER, UNLAWFUL, *supra* note __, at 123 ("[P]rosecutorial discretion ... may be worrisome, but [administrative] waivers are much worse.").

²⁵⁰ *Gundy*, 139 S.Ct. at 2137 (Gorsuch, J., dissenting); Gordon, *supra* note __, 782; Rappaport, *supra* note __, at 352-54; David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1260 (1985); cf. also HAMBURGER, UNLAWFUL, *supra* note __, at 105 (statutory licensing regimes the Founders used for "cross-border or offshore problems" did not contravene the nondelegation principle).

²⁵¹ See *Gundy*, 139 S.Ct. at 2137 (Gorsuch, J., dissenting) (early 19th-century embargo statute can be explained as "permissible [executive] lawmaking" in the area of foreign affairs); *American Railroads*, 575 U.S. at 80 (Thomas, J., concurring in the judgment) (1794 embargo statute did not violate nondelegation principles because it "involved the external relations of the United States"); Cass, *supra* note __, at 157 ("Outside the realm of foreign involved the external relations of the United States affairs ... [Congress] did not authorize the President or the courts or other governmental officers to adopt rules that broadly regulated behavior of private individuals"); Gordon, *supra* note __, at 784-85

exceptionally broad grants of authority regarding restrictions on foreign commerce²⁵² and trade with Native peoples.²⁵³ Such an exception might also justify early statutes that nondelegationists have not addressed, such as those involving military build-ups²⁵⁴ and enforcement of quarantines against foreign vessels.²⁵⁵

The argument in favor of such an exception is seductively straightforward. Because Article II of the Constitution grants the President “substantial authority” in war and foreign relations, delegations in those areas are “already within the scope of executive power.”²⁵⁶ In effect, statutes giving the executive broad discretion in military and foreign relations are not *really* delegations of legislative authority. They merely confirm power the executive already enjoys under the Constitution (if perhaps shared with Congress).²⁵⁷ The argument has obvious flaws—most notably, the early statutes nondelegationists seek to explain all involve military and foreign affairs powers the Constitution expressly grants to *Congress*, not to the President.²⁵⁸ But if we allow that, broadly speaking, military and foreign relations are areas of “overlap[ping]” legislative and executive authority, a carve-out for delegations in this area makes some intuitive sense.²⁵⁹

A Founding-era nondelegation exception for military and foreign affairs cannot explain the Treasury Secretary’s remission authority, for two reasons. First, it is difficult to categorize the Secretary’s power to remit penalties incurred for violations of the

(a foreign affairs exception is the best way to “harmonize” several early delegations with a robust nondelegation doctrine); Rappaport, *supra* note __, at 352-54 (“tentative[ly]” suggesting that early delegations to the executive in military and foreign affairs can be explained as an “exception” justified by constitutional structure and purpose).

²⁵² See Gordon, *supra* note __, at 784 & n.219 (citing Act of June 4, 1794, 1 Stat. 372; Act of March 3, 1795, 2 Stat. 444; Act of June 13, 1798, 1 Stat. 566; Act of February 9, 1799, 3 Stat. 615).

²⁵³ See Lawson, *Original Meaning*, *supra* note __, at 397, 401-02 (citing Act of July 22, 1790, ch. 33, 1 Stat. 137); Rappaport, *supra* note __, at 354 (same); Wurman, *supra* note __, at 48 (delegation in the Indian Intercourse Act of 1790 can be explained by reference to “the President’s treaty and commander-in-chief power”).

²⁵⁴ See Act of March 5, 1792, §§ 2-3, 1 Stat. 241, 241-42.

²⁵⁵ See Act of May 27, 1796, 1 Stat. 474.

²⁵⁶ *Gundy*, 139 S.Ct. at 2137 (Gorsuch, J., dissenting); see also Schoenbrod, *supra* note __, at 1260 (similar).

²⁵⁷ See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (President does not need an act of Congress to act “as the sole organ of the federal government in the field of international relations”).

²⁵⁸ See U.S. Const., Art. I, § 8 (granting Congress power to “raise and support armies” and “regulate commerce with foreign nations . . . and with the Indian tribes”).

²⁵⁹ *Gundy*, 139 S.Ct. at 2137 (Gorsuch, J., dissenting).

customs laws as a power concerning “foreign relations.” That power was related to foreign *commerce*, in that the customs laws regulated imports. But the Constitution gives *Congress* the power to regulate foreign commerce, not the President.²⁶⁰ In addition, the early remission power extended to penalties incurred for purely domestic infractions. For example, the Secretary could remit penalties for violations of statutes regulating the “coasting trade”²⁶¹—i.e., trade *within* United States waters—and statutes prescribing excise taxes on spirits.²⁶²

Second, and more importantly, a foreign relations exception to nondelegation simply did not exist at the Founding.²⁶³ The limited evidence nondelegationists cite is actually no support at all. For example, nondelegationists rely heavily on the Supreme Court’s statement in *United States v. Curtiss-Wright* that delegations of discretion are more permissible with respect to foreign relations.²⁶⁴ Decided in 1936, *Curtiss-Wright* is obviously not itself evidence of a Founding-era foreign relations exception.²⁶⁵ In upholding a 1934 congressional resolution granting the President the power to ban certain arms sales, the Court discussed Founding-era statutes granting the President broad authority to enact or rescind restrictions on foreign commerce related to armed conflict.²⁶⁶ In light of this “unbroken legislative practice,” the Court had little trouble concluding that the 1934 provision was constitutional.²⁶⁷ But the fact that a number of early statutes were *consistent* with a foreign relations exception does not make such enactments *evidence* of such an exception. Without indication that such statutes would have been

²⁶⁰ U.S. Const., Art. I, § 8; see also Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1174 (2019) (as an originalist matter, the Vesting Clause of Article II does not give the President “a free-floating and indefeasible foreign affairs power”).

²⁶¹ Remission Act of 1790, § 1, 1 Stat. 122.

²⁶² See Spirits Act of 1791, § 43, 1 Stat. 199, 209.

²⁶³ See Note, *supra* note __, at 1140 (“No one [at the Founding] suggested th[at] delegations were permissible solely by virtue of their foreign affairs subject matter.”).

²⁶⁴ 299 U.S. 304, 320 (1936) (“[C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”); see also *Gundy*, 139 S.Ct. at 2137 n.42 (Gorsuch, J., dissenting) (citing *Curtiss-Wright* as support for foreign relation exception); *American Railroads*, 575 U.S. at 80 n.5 (Thomas, J., concurring in the judgment) (same).

²⁶⁵ There is also reason to believe that the *Curtiss-Wright* Court invented the foreign affairs exception to justify a delegation that would otherwise have been invalid under the Court’s decisions in *Panama Refining* and *Schechter Poultry* the year before. See Note, *supra* note __, at 1149-51.

²⁶⁶ *Curtiss-Wright*, 299 U.S. at 322-24.

²⁶⁷ *Id.* at 322.

prohibited but for their connection to foreign relations, their existence is just as consistent with a permissive Founding-era understanding of nondelegation generally.²⁶⁸

The other evidence cited by nondelegationists is no more probative of a foreign affairs exception. A 1790 statement by a member of Congress,²⁶⁹ an 1803 treatise passage,²⁷⁰ and an 1808 district court opinion are not actually about delegation.²⁷¹ An 1829 treatise passage—published forty years after ratification—does suggest that Congress can more broadly delegate in the realm of foreign affairs.²⁷² But the writer was not, as one scholar asserts,

²⁶⁸ Indeed, Phillip Hamburger concedes that several Founding-era embargo statutes violated nondelegation principles by empowering the President to do more than “merely determine facts” that would allow commercial restrictions to go into effect. See HAMBURGER, *UNLAWFUL*, supra note __, at 108-09 & n.48 (noting 1794, 1799, 1800, and 1808 statutes). Hamburger does not justify these statutes on the basis of a foreign relations exception. Instead, he argues that, because later embargo statutes (in 1809 and 1810) granted the President less discretion, Congress had “recognized the constitutional problem” with its earlier delegations, and fixed it. *Id.* at 109 & n.51. But it not only took Congress twenty years to realize that its actions were unconstitutional; on Hamburger’s telling, Congress continued to delegate broad authority to the President to limit foreign commerce *after* it had supposedly seen the errors of its ways. See *id.* (noting congressional “lapse” in 1822, among others).

²⁶⁹ See Gordon, supra note __, at 784-85. The 1790 statement arose in a debate over whether Congress could statutorily require the President to seek the Senate’s consent when setting compensation for American diplomatic officials out of appropriated funds. See 12 DHFFC 71-72. In other words, the discussion was not about whether Congress could more broadly *grant* legislative authority to the executive when “foreign relations” were involved. It was about whether Congress could *limit* the President’s Article II authority to direct U.S. diplomacy. See 12 DHFFC 72 (“[I]ntercourse with foreign nations is a trust specially committed to the President of the United States; and after the Legislature has made the necessary provision to enable him to discharge that trust, the manner how it shall be executed must rest with him.”).

²⁷⁰ See Gordon, supra note __, at 784-85. The passage from St. George Tucker’s edition of Blackstone’s Commentaries says nothing about delegations of legislative authority. As Tucker makes very clear, he was discussing a 1793 controversy over whether, by announcing that the United States would remain neutral in the growing war between France and Great Britain, President Washington had improperly exercised the power to “declare war” granted to Congress under Art. I, § 8, cl. 11. See 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES 346-47 & n. (1803). This dispute was not about delegation, as Congress had not legislated at all.

²⁷¹ See Gordon, supra note __, at 784-85. The 1808 opinion regarding the constitutionality of the Jeffersonian embargo was not about whether Congress can permissibly delegate authority to the President to suspend the embargo. The court mentioned the President’s power to suspend the embargo only once, in passing. *United States v. the William*, 28 F. Cas. 614, 622 (D. Mass. 1808). The constitutional issue the court discussed was whether Congress had the power under Article I to institute such broad restrictions on foreign commerce in the first place. See *id.* at 620-24 (“It is contended, that congress is not invested with powers, by the constitution, to enact laws, so general and so unlimited, relative to commercial intercourse with foreign nations, as those now under consideration.”).

²⁷² See RAWLE, supra note __, at 196 (“Among other incidents arising from foreign relations, it may be noticed that congress, which cannot conveniently be always in session, may devolve on the president, duties that at first view seem to belong only to themselves.”).

“reflecting on the first few decades under the Constitution.”²⁷³ Instead, he was discussing an 1813 decision of the Supreme Court that did not discuss a foreign relations exception to nondelegation; indeed, it did not directly address delegation at all.²⁷⁴

Just as importantly, there is also strong evidence *against* a foreign affairs exception to nondelegation. On multiple occasions in the first two decades following Ratification, federal legislators argued that legislation giving the executive broad discretion related to military and foreign affairs violated nondelegation principles.²⁷⁵ For example, the 1798 Alien Act empowered the President to order the removal of any foreign citizen he deemed “dangerous to the peace and safety of the United States.”²⁷⁶ Other proposed legislation that year authorized him to raise an army of up to 20,000 troops “whenever he shall judge the public safety shall require the measure.”²⁷⁷ An 1808 law allowed the President to suspend a statutory embargo on foreign commerce whenever he concluded that the actions of warring European powers “render[ed] the United States sufficiently safe.”²⁷⁸ An 1810 proposal would have given the

²⁷³ Gordon, *supra* note __, at 786.

²⁷⁴ See RAWLE, *supra* note __, at 196 n.*. In *The Brig Aurora*, the owner of cargo seized for alleged violation of an 1810 law that empowered the President to put an embargo into effect if he determined that France or Great Britain was violating United States neutrality by seizing American ships. The owner argued that Congress could not give the President the power to put the embargo into effect. In response, the attorney for the government argued that Congress had not “transfer[red] any power of legislation to the President.” It had only empowered him to determine, as a factual matter, whether the warring powers were violating United States neutrality. The Court did not address the issue directly. All it said was that it could “see no sufficient reason, why the legislature should not exercise its discretion in reviving the act ... either expressly or conditionally, as their judgment should direct.” *The Aurora*, 11 U.S. 382, 388 (1813).

²⁷⁵ See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 186-87 (1997) (1794 bill allowing the President to decide the size of the army); *id.* 244-48 (1798 bill authorizing to the President to raise an additional volunteer military force); *supra* notes __ and __ accompanying text (1797 Remission Act reauthorization); Gordon, *supra* note __, at 747-48 (1798 bill empowering the President to order the removal of aliens); *id.* 748-49 (1810 bill given the President standardless authority to deploy naval ships to “protect the commerce of the United States”); HAMBURGER, *UNLAWFUL*, *supra* note __, at 107 (1808 bill allowing the President to suspend a statutory embargo on foreign commerce) see generally Note, *supra* note __, at 1140-46.

²⁷⁶ An Act Concerning Aliens, 1 Stat. 570, 571 (1798); see also 8 ANNALS OF CONG. 2007-08 (1798) (Livingston) (arguing the Act unconstitutionally combined “legislative, executive, and judicial powers”).

²⁷⁷ 8 ANNALS OF CONG. 1631; see also *id.* at 1538 (Gallatin) (arguing that the bill “improper[ly] ... vested Legislative power in the President of the United States.”); Mortenson & Bagley, *supra* note __, at 116-19 (reviewing debate over the bill).

²⁷⁸ Embargo Act of 1808, 2 Stat. 490; see also 18 ANNALS OF CONG. 2118 (Key) (“We cannot transfer the power of legislating from ourselves to the president”).

President apparently standardless authority to deploy naval ships to “protect the commerce of the United States.”²⁷⁹

Notably, in no case did proponents of the proposed legislation defend it on grounds of a delegation exception for military and foreign affairs. This is puzzling, to say the least. If this exception was “well-established” at the Founding,²⁸⁰ why was it never invoked to defend these bills’ constitutionality? For that matter, why did members of Congress persist in decrying as unconstitutional such legislative grants of authority for two decades after Ratification, if that was universally understood to be a losing argument? If it was consensus in the Founding era that Congress has significant latitude to delegate in the realms of military and foreign affairs, it seems odd that *no one* in Congress thought this was worth mentioning.

The obvious solution to this puzzle is that such an exception to nondelegation did not exist. Indeed, it is not all clear that Founding-era Americans would have understood “foreign affairs” to constitute a distinct category of legislative authority in the first place. In an era when constant international armed conflict threatened the nation’s commerce and security (as well as providing opportunities for American aggrandizement), concern over foreign relations impacted virtually all “domestic” policymaking.²⁸¹ The foreign affairs exception to the nondelegation principle is almost certainly a modern invention—either by the *Curtiss-Wright* Court in 1936, or by originalist scholars seeking to explain how a Founding generation committed to stringent limits on delegation could have repeatedly sanctioned broad grants of authority to the executive. Perhaps a military and foreign affairs exception to nondelegation makes sense on structural or functional grounds.²⁸² But it is difficult to justify as an originalist matter.

2. Benefits

Remission also cannot be explained by resort to a second exceptional category nondelegationists identify: one for delegations relating to government privileges and benefits. Under this theory, a

²⁷⁹ 21 ANNALS OF CONG. 2022 (1810); see also *id.* (Jackson) (“All legislative power is by the Constitution vested in Congress. They cannot transfer it.”).

²⁸⁰ Gordon, *Rebuttal*, *supra* note __, at 33.

²⁸¹ See BRIAN BALOGH, A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN 19TH CENTURY AMERICA 155-56 (2009) (“With borders shifting daily and trade subjected to the whims of powerful nations that dominated the sea lanes, the distinction between domestic and foreign policy was meaningless.”); Parrillo, *Critical Assessment*, *supra* note __, at 19-20 (1798 federal land tax prompted by need to finance military preparations for war with France).

²⁸² See Rappaport, *supra* note __, at 352-54.

legislative delegation is unconstitutional only when the rules issued by the executive pursuant to the delegation “bind” or “constrain” individuals. Rules that merely regulate the provision of privileges and benefits do not have such “binding” force, and therefore can lawfully be created by the executive.²⁸³ In deeming unconstitutional most executive-issued rules “governing private conduct,” Justice Gorsuch appear to subscribe to this theory.²⁸⁴ Again for good reason, as a constraints/benefits distinction helps nondelegationists make sense of several early federal statutes that otherwise appear to violate nondelegation principles.²⁸⁵

As an originalist explanation for the Remission Act, this theory suffers from similar flaws as the foreign relations exception. First, leaving aside the fact that no one in Congress justified the Act on such grounds, it seems doubtful whether a privileges exception actually existed at all. Its proponents cite *no* Founding-era evidence indicating such an exception.²⁸⁶ And again, early legislation that seemingly would have qualified as regulating “benefits” was attacked by opponents on nondelegation grounds.²⁸⁷ For example, in a 1791 episode often cited by nondelegationists as evidence of a robust Founding-era principle,²⁸⁸ James Madison and others criticized as unconstitutional a proposal that would have given the President broad discretion to designate “post roads” along which the mails would run.²⁸⁹ If there had been a consensus view that Congress

²⁸³ See HAMBURGER, UNLAWFUL, *supra* note __, at 3 n.*, 84-85.

²⁸⁴ *Gundy*, 139 S.Ct. at 2143 (Gorsuch, J., dissenting); see also Bamzai, *supra* note __, at 182 (“A distinction between rights and privileges might explain several laws enacted in early Congresses that delegated authority to the executive branch”); Wurman, *supra* note __, at 52 (“Perhaps Congress had more power to delegate authority to establish public privileges.”).

²⁸⁵ See HAMBURGER, UNLAWFUL, *supra* note __, at 86 (1790 act empowering the President to set rates for military pensions); Bamzai, *supra* note __, at 182 (1790 act allowing executive branch to license and regulate trade with Indian tribes); *id.* (1790 act authorizing executive officials to issue patents); cf. also Joseph Postell & Paul D. Moreno, *Not Dead Yet - Or Never Born - The Reality of the Nondelegation Doctrine*, 3 CONST. STUD. 41, 47 (2018) (asserting that most Founding-era delegations resulted in executive regulations that “‘did not bind’” the public).

²⁸⁶ See *American Railroads*, 575 U.S. at 83 n.7 (Thomas, J., concurring in the judgment) (discussing *United States v. Grimaud*, 220 U.S. 506 (1911)); Bamzai, *supra* note __, at 178 (identifying *Grimaud* as “the key precedent” supporting a rights/privilege distinction for nondelegation); HAMBURGER, UNLAWFUL, *supra* note __, at 84-85 (citing only John Locke and Edward Coke).

²⁸⁷ See Parrillo, *Supplemental Paper*, *supra* note __, at 19-20.

²⁸⁸ See Lawson, *Original Meaning*, *supra* note __, at 402-03; JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE’S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 75-77 (2017); Wurman, *supra* note __, at 14-20.

²⁸⁹ See Mortenson & Bagley, *supra* note __, at 97-106. I discuss the “post roads debate” at greater length in Part IV.B.

could broadly delegate legislative authority to the executive when “privileges” were at issue, Madison’s nondelegation critique would have been pointless. And the proposal’s supporters would likely have invoked the exception, instead of defending the proposal on the ground they actually did—that Congress generally had the authority to make such an expansive delegation.²⁹⁰

Moreover, even if a benefits exception did exist at the Founding, the Remission Act is an awkward fit. Formally, it might make sense; the Act assumed that a penalty has already been “incurred,”²⁹¹ so one can view remission granted by the Treasury Secretary as merely bestowing upon the petitioner a government “benefit” to which he has no legal right. But that is not how remission worked in the real world. As described above, the remission mechanism was effectively an alternative, executive branch procedure for adjudicating cases involving customs violations.²⁹² When someone filed a petition seeking remission, no actual penalty was decided upon or imposed until the Treasury Secretary made his decision.

The difficulty of cleanly categorizing remission as a “benefit” also illustrates the larger problem with the constraint/benefit distinction. As its leading proponent, Phillip Hamburger, acknowledges, some denials of benefits “operate in the manner of a constraint,” and should be treated as such for constitutional purposes.²⁹³ Though Hamburger does not offer a way of distinguishing “pure” benefits from “benefits-as-constraints,” it seems safe to assume that a benefit that was, in reality, a penalty imposed for violating the law would count as a “constraint.”²⁹⁴

²⁹⁰ See 3 ANNALS OF CONG. 232 (Bourne) (“The Constitution meant no more than that Congress should possess the exclusive right of doing that, by themselves or by any other person, which amounts to the same thing.”).

²⁹¹ Remission Act of 1790, 1 Stat. 122; see also *United States v. Morris*, 23 U.S. 246, 291 (1825) (the Remission Act “presupposes[] that the offence has been committed,” and simply “affords relief for ... unintentional error”).

²⁹² See *supra* notes __ to __ and accompanying text.

²⁹³ HAMBURGER, UNLAWFUL, *supra* note __, at 3 n.* (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Mathews v. Eldridge*, 424 US 319 (1976)); see also Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 732 (1994) (noting the “difficulty” of distinguishing “rules of private conduct from those merely affecting or encouraging private conduct”).

²⁹⁴ Indeed, Hamburger later argues that, in the English tradition, laws that “obliged”—i.e., that coerced—“included those that *relaxed* legal duties.” HAMBURGER, UNLAWFUL, *supra* note __, at 84 (emphasis added). On his account, any executive “alteration of a legally binding duty” was “unlawful.” *Id.*

Accordingly, the Remission Act should have run afoul of the Founding-era nondelegation doctrine that Hamburger and others espouse. But it did not. Nor did other examples of Founding-era “benefits” legislation that delegated broad policymaking power to the executive. For example, a 1790 statute gave the President unfettered authority to prescribe regulations governing licenses given to persons who wanted to trade with Native peoples. Because such trading was prohibited without a license, the statute clearly allowed the executive to impose “constraints.”²⁹⁵ So too with the Patent Act of 1790, which empowered executive branch officials to issue patents granting “inventors the *exclusive* right to their ... discoveries”—i.e., the executive could “constrain” people from engaging in conduct the patent covered.²⁹⁶ In short, on multiple occasions the early Congresses gave the executive branch broad authority to regulate the provision of “benefits” in ways that actually placed meaningful limits on private conduct.

3. *Unimportance*

A third possibility for explaining the Remission Act is that Congress simply thought remission was not that important. Taking their cue from an opinion authored by Chief Justice Marshall in 1825, nondelegationists like Gary Lawson and Ilan Wurman have suggested that Congress cannot delegate authority over “important subjects,” but it can over matters of “less interest.”²⁹⁷ Justice Gorsuch echoed this view in *Gundy*, when he allowed that the executive branch can “fill up the details” of a regulatory scheme, as long as Congress has made the key “policy decisions” first.²⁹⁸

²⁹⁵ Act of July 22, 1790, 1 Stat. 137; see also Wurman, *supra* note __, at 39 (“This was indeed a broad statute that delegated authority to regulate private conduct.”).

²⁹⁶ Act of Apr. 10, 1790, 1 Stat. 109 (emphasis added). Hamburger argues that patents were historically not considered “binding,” because the patent only prevented other people from engaging in conduct the patent covered; otherwise, they could do what they liked. HAMBURGER, *UNLAWFUL*, *supra* note __, at 201-02. Of course, the fact that a patent only *partially* constrained others does not mean it is not a “constraint,” and Hamburger admits that the distinction is “artificial.” *Id.*; cf. also Wurman, *supra* note __, at (noting that rules created by the executive branch under the Patent Act “would alter the rights of private persons”).

²⁹⁷ *Wayman v. Southard*, 23 U.S. 1, 92-93 (1825); see Lawson *Original Meaning* 376-77 (“Congress must make the central, fundamental decisions, but Congress can leave ancillary matters to the President or the courts.”); Wurman, *supra* note __, at 7 (“[T]he picture the founding-era history paints is one of a nondelegation doctrine whereby Congress could not delegate to the Executive decisions over ‘important subjects’”).

²⁹⁸ *Gundy*, 139 S.Ct. at 2136 (Gorsuch, J., dissenting); *Paul v. United States*, 140 S.Ct. 342, 342 (2019) (Kavanaugh, J.) (“[M]ajor national policy decisions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive Branch”).

As a *theory* of nondelegation, an “important subjects” approach makes some sense. If we assume there was *some* Founding-era limit on Congress’s power to delegate legislative authority, requiring Congress to make “important” policy decisions before delegating “details” to the executive is at least consistent with constitutional separation of powers principles.²⁹⁹ If nothing else, an important-subjects theory of nondelegation seems more plausible than a general prohibition on delegation riddled with various subject-matter exceptions.

Yet this approach, too, is fraught with difficulty. The first problem is conceptual (and obvious): “Importance” is very much in the eye of the beholder.³⁰⁰ As recognized by Chief Justice Marshall and modern scholars on all sides of the debate, distinguishing important “policy decisions” from unimportant “details” in a principled, consistent way is challenging, to the say the least.³⁰¹ Wurman, for example, offers no criteria for drawing such a line.³⁰² He suggests that the important/unimportant dichotomy mirrors the distinction he advances between “exclusive” and “nonexclusive” legislative powers—i.e., Congress has “exclusive” (and nondelegable) authority to decide important policy questions, but can give the executive the “nonexclusive” power to specify unimportant details in a legislative scheme. But Wurman offers no more guidance in distinguishing “exclusive” from “nonexclusive” legislative powers than he does in separating important subjects from unimportant details. And Lawson concedes that his approach—which relies on an analogy to the law of agency—does

²⁹⁹ See Wurman, *supra* note __, at 24.

³⁰⁰ See Mortenson & Bagley, *supra* note __, at 20 (an important-subject theory “would force courts to make subjective and contestable judgments about what counts as a detail and what counts as something more”); cf. Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1982-1990 (2017) (critiquing on similar grounds the “major questions” exception to *Chevron* deference).

³⁰¹ See *Wayman*, 23 U.S. at 43 (“The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest”); Lawson, *Original Meaning*, *supra* note __, at 361 (“Surely ... the constitutionality of legislative authorizations to executive and judicial actors cannot turn on something as ephemeral, and ultimately circular, as a distinction between ‘important subjects’ and matters of ‘less interest.’”); Wurman, *supra* note __, at 1 (“What are the important policies that must be resolved by Congress are sometimes, of course, in the eye of the beholder.”); cf. also Sunstein, *supra* note __, at 326-27 (“The real question is: How much executive discretion is too much to count as ‘executive’? No metric is easily available to answer that question.”).

³⁰² Wurman does suggest that Congress has more latitude in delegating “important” matters involving public rights than private rights. As discussed earlier, that distinction, too, is historically unjustified and conceptually problematic. See *supra* Part III.B.2. In any event, it offers no guidance for resolving the first-order question of whether the matter delegated to the executive is “important” or not.

not “yield a crisp line ... between what is important and what is of less interest.”³⁰³

The second problem is historical (and less obvious): As intuitively appealing as the important subjects theory may be, it does not appear to be one to which members of the Founding generation subscribed. The secondary literature reports no instance of nondelegation discussed in “importance” terms before Justice Marshall’s statement in *Wayman*—which he made more than three decades after Ratification.³⁰⁴ In his recent article, Wurman repeatedly asserts that particular Founding-era delegations are “consistent” with an important-subjects theory, but does not point to evidence that anyone at the Founding articulated such a theory.³⁰⁵ For his part, Lawson argues that an important-subjects theory grounded in agency law is part of the Constitution’s original meaning, but that proposition relies on Lawson’s more general—and contestable—belief that the Constitution itself was understood at the Founding to be a sort of fiduciary instrument.³⁰⁶ Accordingly, while an important subjects theory of nondelegation might be sensible, it does not appear that anyone at the Founding actually articulated it.

In fact, Congress’s early legislative record suggests that delegation of important questions to the executive was entirely permissible. The Remission Act itself is a good example. As discussed earlier, there was broad agreement in Congress that the remission power was “important,” in two senses: It was crucial for ensuring that innocent lawbreakers were not subject to harsh

³⁰³ Lawson, *Private-Law Framework*, supra note __, at 26. In terms of concrete guidance, Lawson advances only the “tentative” suggestion that congressional delegation may be more permissible on questions that do not require “national uniformity,” such that “local knowledge” available only to executive branch officials might be needed in order to fashion policy. *Id.* at 27-28.

³⁰⁴ During the post roads debate, one representative who voiced nondelegation objections to the proposed grant of discretion to the executive suggested that the establishment of post roads was “a very important object,” though it is not clear that, in his view, the roads’ importance was what made the delegation unconstitutional. 2 ANNALS OF CONG. 229, 230 (Livermore); see also Wurman, supra note __, at 14-20.

³⁰⁵ Wurman, supra note __, at 57.

³⁰⁶ See Lawson, *Private-Law Framework*, supra note __, at 11 (“[T]he real ground for the Constitution’s nonsubdelegation principle is the nature of the Constitution as a particular kind of [fiduciary] legal instrument.”). See generally GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017). But see Richard Primus, *The Elephant Problem*, 17 GEO. J.L. & PUB. POL’Y 373 (2019) (“As a historical matter, there is virtually no evidence that the Founders thought of the Constitution on the model of a power of attorney.”); Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479, 1484 (2020) (“[T]he historical, philosophical, and legal foundations of fiduciary constitutionalism are weak.”).

penalties, and also had to be employed carefully, so as not to undermine revenue collection—itself a critical matter.³⁰⁷ As Joseph Story wrote in 1815, the remission power was understood to be “one of the most important and extensive powers” the government possessed.³⁰⁸ Little wonder that none of the Act’s proponents justified it based on lack of importance.

Other examples abound. In 1790, Congress granted the President broad discretion to borrow up to \$12 million dollars from foreign lenders—a sum that, as a percentage of GDP, would be the equivalent of more than a *trillion* dollars today.³⁰⁹ In 1794, it authorized the President to impose a complete embargo on foreign trade “whenever, in his opinion, the public safety shall so require.”³¹⁰ In 1798, it enacted a real estate tax of up to \$2 million that gave executive branch officials broad latitude to decide how the tax burden would be distributed within states.³¹¹ The list goes on.³¹²

One might argue that these delegations did not contravene an “important subjects” theory, because Congress decided all the *really* important matters. For instance, Wurman suggests that, by capping the borrowing and tax power discussed above, Congress left only minor matters to executive discretion,³¹³ and he justifies numerous other early delegations on similar grounds.³¹⁴ One could say the same about the Remission Act—Congress set the upper limit on penalties, and set forth a standard for determining who qualified for remission. Perhaps the Treasury Secretary’s discretion to decide what penalty to impose on lawbreakers was simply an “unimportant” detail that could constitutionally be left to the executive branch.

Such arguments, however, only put us back to square one: How do we distinguish between important matters Congress must decide and unimportant details it can delegate? Maybe proponents of this theory will flesh it out in ways that render it judicially administrable. But as an originalist matter, the absence of historical evidence in its favor offers no good reason for the Supreme Court to abandon its

³⁰⁷ See *supra* notes ___ to ___ and accompanying text.

³⁰⁸ *The Margarettas*, 16 F. Cas. 719, 720–21 (C.C.D. Mass. 1815).

³⁰⁹ See Act of Aug. 4, 1790, 1 Stat. 138, 139; Chabot, *supra* note ___, at 26–27.

³¹⁰ See Act of June 4, 1794, § 1, 1 Stat. 372, 372; Note, *supra* note ___, at 1141–42.

³¹¹ See Parrillo, *Critical Assessment*, *supra* note ___, at 21–24.

³¹² See generally Mortenson & Bagley, *supra* note ___, at 76–96.

³¹³ See Wurman, *supra* note ___, at 49–54.

³¹⁴ See, e.g., Wurman, *supra* note ___, at 45–46 (pensions); *id.* at 48 (naturalization); *id.* at 52–53 (patents),

longstanding “intelligible principle” test in favor of such an elusive approach to delegation.

4. *Necessity*

Finally, there is the possibility of necessity: Congress *had* to delegate certain functions—including remission—to the executive, because it could not feasibly perform those tasks itself. Again, the theory is plausible. It would be absurdly self-defeating to prohibit Congress from delegating essential tasks it cannot itself perform, and the Constitution, we know, is not “a suicide pact.”³¹⁵ Indeed, the Court’s historically permissive approach to delegation has been shaped by a recognition that any limit on Congress’s power to delegate must take into account “common sense and the inherent necessities of the governmental co-ordination.”³¹⁶ As the Court explained in *Mistretta v. United States*, “in our increasingly complex society ... Congress simply cannot do its job absent an ability to delegate power under broad general directives.”³¹⁷

If “necessity” as the touchstone of delegation makes intuitive sense, as a standard for distinguishing between permissible and impermissible delegations it suffers from the same problems as an “important subjects” theory. First, there is little evidence members of the Founding generation framed delegation in these terms. It certainly was not present in debates over the Remission Act. While members of Congress generally agreed that the remission power *itself* was essential, no one argued that Congress had to delegate that power *to the executive branch*.³¹⁸

Evidence that “necessity” was a core concept in Founding-era views about delegation is lacking more generally, too. Gary Lawson and Christine Chabot both rely on a 1791 comment by James Madison suggesting that departures from nondelegation orthodoxy might be justified on such grounds.³¹⁹ But others in the same debate

³¹⁵ *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). But see DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 173 (1993) (the supposed necessity of delegation does not excuse constitutional violations).

³¹⁶ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

³¹⁷ 488 U.S. 361, 372 (1989); see also *Am. Power & Light Co. v. Sec. & Exch. Comm’n*, 329 U.S. 90, 105 (1946) (“Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules”).

³¹⁸ See *supra* Part II.A.

³¹⁹ See 2 *ANNALS OF CONG.* 238-39 (Madison) (“[T]here did not appear to be any necessity for alienating the powers of the House; and that if this should take place, it would be a violation of the Constitution.”); Chabot, *supra* note __, at 40-43 (extrapolating a “necessity” test for delegation from Madison’s statement); Lawson, *Private-Law Framework*, *supra* note __, at 35-37 (similar).

rejected the idea,³²⁰ and it appears that arguments from necessity otherwise did not appear in Founding-era discussions. Ilan Wurman suggests in passing that several early delegations were constitutionally permissible because “[i]t is difficult to imagine what more Congress could have been expected to do.”³²¹ But Wurman does not embrace “necessity” as a defining characteristic of an original nondelegation principle, let alone offer evidence that it was. As a result, any originalist effort to replace the Court’s longstanding “intelligible principle” test with a more stringent “necessity” argument would seem to fail, at minimum, for lack of proof.³²²

Second, a “necessity” standard for delegation raises the same subjectivity problems that flow from an “important subjects” theory. The Remission Act again offers a telling example. Congress certainly had the ability to handle remission petitions itself; it did so both before the Act’s passage and after,³²³ and did the same with thousands of others.³²⁴ Yet as I discuss below, Congress may have delegated the remission power to the Treasury Secretary because doing so would free the legislature to focus on other matters.³²⁵ So to determine whether it was “necessary” for Congress to delegate the remission power, we first have to have a more general opinion about how the early Congress should have spent its limited time.³²⁶ Thus even if a “necessity” exception to nondelegation was historically justified, it offers little help in distinguishing permissible from impermissible delegations.

³²⁰ See 3 ANNALS OF CONG. 239 (1791) (Sedgwick) (“A supposed necessity could not justify the infraction of a Constitution which the members were under every obligation of duty and their oaths, solemnly pledged, to support.”)

³²¹ Wurman, *supra* note __, at 47-48; see also *id.* 49, 50.

³²² To be clear, neither Chabot nor Lawson argue that a “necessity” standard would tighten the “intelligible principle” test, let alone replace it. For Chabot, the two principles are entirely consistent, given the Court’s repeated reference to necessity concerns in reaffirming its longstanding test. See Chabot, *supra* note __, at 44. For Lawson, arguments about necessity—which he believes are consistent with an original fiduciary understanding of the Constitution—simply collapse into first-order disputes over what tasks Congress should undertake in the first place. See Lawson, *Private-Law Framework*, *supra* note __, at 37-39 (“If Congress’s ‘job’ is indeed to micro-manage the entirety of American society, there is at least a serious argument that massive subdelegation can be justified by even a strict Madisonian understanding of necessity.”); cf. HAMBURGER, *UNLAWFUL*, *supra* note __, at 420-22 (in the modern administrative state, alleged “necessity” is a constant condition).

³²³ See *supra* notes __ to __ and accompanying text.

³²⁴ See McKinley, *supra* note __, at 1573-74, 1590.

³²⁵ See *infra* Part IV.A.

³²⁶ See Lawson, *Private-Law Framework*, *supra* note __, at 39 (the “necessity” argument the Court makes in *Mistretta* presumes that Congress’s “job” “involves ... a massive overseeing of everybody’s lives, fortunes, and sacred honors”).

* * *

In the end, none of the various distinctions nondelegationsists have proposed can explain why a number of early delegations—including the Remission Act—did not run afoul of the robust limits on legislative grants of power that supposedly inhere in the Constitution. The most sensible conclusion is that, in the Founding era, such limits did not exist.

IV. DELEGATION AND IMPROVISATION AT THE FOUNDING

If the Remission Act and other early federal legislation point to a permissive view of delegation at the Founding, a question remains: *Why* did Congress repeatedly delegate broad authority to the executive branch? The answer may not matter much for arguments over the original understanding of Congress's power to delegate. In evidentiary terms, what counts most is the delegations themselves, and what they tell us about what the Founding generation thought about constitutional limits (or lack thereof) on Congress's ability to give legislative power to the executive.

That said, there is value in stepping back and considering more broadly why Congress structured powers like remission the way it did. If nothing else, trying to get a glimpse of legislative motivations can explain how the Founding generation could have routinely tolerated broad delegations of legislative authority under a Constitution predicted on separation of powers.

The simple—if perhaps inelegant—answer is that granting broad policymaking discretion to the executive branch was often the least-worst way to balance competing legislative priorities. As Part IV.A shows, the Remission Act offers a telling example. After considering and debating a number of different institutional mechanisms through which the federal government could moderate the potentially harsh effects of customs-related penalties, Congress settled on broad discretion vested in the Treasury Secretary. Not because that was obviously the correct—or constitutionally acceptable—choice, but because it was the best among imperfect options.

More importantly, the architects of early federal authority discussed the possibilities largely in the language of governmental efficiency, not constitutional limitation. As Part IV.B discusses, this was a pattern repeated across the domains of federal authority, as Congress struggled to devise new solutions to the myriad problems of national governance. Indeed, attending to the early period's administrative dynamism helps make sense of two additional examples of delegation that figure prominently in the originalist

literature. Whatever nondelegation principle the architects of the early remission power may have thought inhered in the Constitution, it did not appear to shape their choices about how to design a functional administrative system.

A. Delegating to the Executive

So why did Congress give its authority to remit penalties to the Treasury Secretary? Though the evidence is circumstantial, the historical records reveal several possibilities.

One is that Congress valued the consistency that executive resolution offered. Recall that, under the original House proposal, the Remission Act would have assigned authority to local federal officials, including district judges. But later versions of the bill shifted authority to the executive branch, first to a three-member panel of cabinet officers, and then to the Treasury Secretary alone.³²⁷ This change met objections; several members were concerned that centralized decision-making would slow the delivery of warranted relief, and operate to advantage of merchants located near seat of government.³²⁸ Yet Congress apparently concluded that the “strict justice”³²⁹ that a single decision maker would provide would “more effectually ... secure the revenue.”³³⁰

Indeed, Fisher Ames, the Act’s chief proponent, doubted whether Congress was equal to the task of ruling on remission petitions consistently. In responding to Edward Livingston’s argument that Congress could not constitutionally delegate the remission power, Ames questioned whether a “popular body” could produce “anything like system” in this area.³³¹ He may have had good reasons for his doubts. The House’s procedural mechanisms for responding to petitions might have enabled it to rule consistently with past decisions.³³² But any action in favor of a petitioner was

³²⁷ See *supra* Part II.B.

³²⁸ See 1 ANNALS OF CONG. 1475 (Goodhue) (petitioners far from the national capital would suffer from delay); 12 DHFFC 845 (Sherman) (“The amendment made by the Senate will cause some delays.”); *id.* at 846 (Jackson) (“The people who [are] referred to the Secretary of the Treasury [will be] dragged over to New York to be tried.”); *id.* (Smith) (“The distant inhabitants will lose all possible relief. This amendment seems calculated for the (merchants) of this city.”); *id.* 847 (remission “[o]ught to be determined in the state where [the offense] happens”).

³²⁹ 1 ANNALS OF CONG. 1474 (Sherman); see also 6 ANNALS OF CONG. 2286 (Ames) (rejecting option of making customs laws “loosely,” and giving “considerable discretion” to front-line officers in execution).

³³⁰ 1 ANNALS OF CONG. 1474 (Sherman).

³³¹ 6 ANNALS OF CONG. 2288 (Ames).

³³² See McKinley, *supra* note __, at 1561-62 (discussing regularized House procedures for responding to petitions, including standing committees for particular subject areas).

subject to approval by the entire legislature.³³³ The Secretary also had an expertise advantage. As one representative argued very early in the debates, the Secretary's "general superintendence" over the customs system meant that he was particularly well-informed about its operation, and was therefore best-positioned to "establish a uniform rule" regarding remission.³³⁴ And as discussed earlier, it appears that the early Secretaries in fact did exercise their power in predictable and consistent ways.³³⁵

A second possibility is neutrality. Ames, in particular, worried that legislative politics would have a distorting effect on remission decisions. In his view, it would be impossible for Congress to decide on petitions free of the influence of "local sympathy."³³⁶ Every representative would feel obliged to advocate on behalf of constituents seeking relief,³³⁷ which would "dirty their fingers"³³⁸ and produce unfortunate "precedent[s]" that subsequent petitioners could invoke to support their suspect claims.³³⁹

In contrast, Ames thought executive branch officers were insulated from political pressure.³⁴⁰ They owed "responsibility" to Congress—and the nation—as a whole, a fact that would help ensure "proper conduct" in using the remission power.³⁴¹ Or as another representative asserted, the Treasury Secretary was "naturally ... bias[ed]" in favor of augmenting federal revenue, so there was "no danger" in placing the remission power in his hands.³⁴² Not everyone agreed—Edward Livingston thought that a single decision-maker would be more likely to be influenced by wealthy and powerful merchants seeking to use the system to their advantage.³⁴³ But at minimum it seems that the promise of administrative neutrality may have encouraged Congress to delegate remission to the Treasury Secretary.

³³³ McKinley, *supra* note __, at 1549 n.34.

³³⁴ 12 DHFFC 10 (Boudinot).

³³⁵ See *supra* Part III.A.1.

³³⁶ 6 ANNALS OF CONG. 2286 (Ames).

³³⁷ See 6 ANNALS OF CONG. 2288 (Ames) ("[I]f one of his constituents were to come to him and request relief, he should find himself necessarily interested in his behalf.")

³³⁸ 6 ANNALS OF CONG. 2288 (Ames).

³³⁹ 6 ANNALS OF CONG. 2286 (Ames).

³⁴⁰ See 6 ANNALS OF CONG. 2286 (Ames) (delegating the remission power to "Executive Officers" would prevent the influence of "local sympathy" from affecting decisions).

³⁴¹ 6 ANNALS OF CONG. 2288 (Ames).

³⁴² 6 ANNALS OF CONG. 2285 (Sitgreaves).

³⁴³ See 6 ANNALS OF CONG. 2289 (Livingston) ("[I]t was certainly more difficult to influence several men than one man.").

There is also a third, more prosaic explanation for why Congress delegated the remission power. It wanted to relieve itself of the burden of responding to petitions. Hamilton suggested as much in his 1790 proposal: Vesting remission authority outside Congress would avoid the “inconvenience of a Legislative Decision” on individual applications.³⁴⁴ At least one member of Congress agreed; if the House did not divert petitions somewhere else, it would be “consumed in local concerns,” unable to focus on “promoting the public good.”³⁴⁵ The problem remained when Congress expanded the Secretary’s power seven years later; delegating authority over more pleas for relief was required to rid the House of petitions that continued to “engage [its] attention every session.”³⁴⁶ As one representative bluntly warned, if legislators were obliged to dispose of such petitions, “they might sit the whole year round about subjects worse than nothing.”³⁴⁷

In the end, the best answer to the question of why Congress delegated such broad authority to the Treasury Secretary might be “all of the above.” That is, there was no single reason for the decision; representatives who supported the Remission Act did so for a variety of reasons. Nor was the delegation to the Secretary the obvious choice. Each of the possible configurations of the remission power involved tradeoffs among important values: consistency, expertise, neutrality, capacity. Granting authority to the Treasury Secretary was simply the best—or least-worst—of several imperfect solutions. As one representative put it, the legislature initially gave remission to the Secretary because “[n]o better mode could then be thought of.”³⁴⁸

Reflecting this administrative ambivalence, Congress made the Act temporary, and did not make it permanent for another decade.³⁴⁹ It considered other configurations in the meantime.³⁵⁰ Little wonder

³⁴⁴ Saddler Report, *supra* note ____.

³⁴⁵ 12 DHFFC 11 (Boudinot).

³⁴⁶ 6 ANNALS OF CONG. 2285 (Livingston); see also 6 ANNALS OF CONG. 2285 (Sitgreaves) (the 1797 act extended the Treasury Secretary’s remission power to violations of statutory requirements regarding vessel licensing and registration was because “the time of the House had been considerably occupied by petitions for remissions of forfeitures”)

³⁴⁷ 6 ANNALS OF CONG. 1789 (unattributed).

³⁴⁸ 6 ANNALS OF CONG. 2287 (Coit).

³⁴⁹ See *supra* Part II.C.

³⁵⁰ For example, an early version of a 1791 act regulating distilled spirits provided for remission of penalties by the district court judge, with an appeal to the Supreme Court available in cases worth \$500 or more. Enclosure: [An Act Repealing Duties Laid Upon Distilled Spirits Imported], [9 January 1790], <https://founders.archives.gov/documents/Hamilton/01-06-02-0076-0002-0013>. The final version of the act gave remission authority

that, when critics in 1797 fretted about the danger of concentrating so much power in one person's hands, one defender responded with a rhetorical shrug: However "extraordinary" the remission power was, the Secretary had been exercising it for years, and "no material inconvenience had arisen."³⁵¹ In other words, what cemented executive-branch remission into the permanent architecture of federal law enforcement was not a grand theory about the relative domains of legislative and executive authority. It was the simple fact that the Act worked well enough.

Importantly, whatever members of Congress thought of the merits of particular institutional arrangements, they did not think that the Constitution meaningfully constrained their options. As discussed earlier, opponents of the Remission Act made only a handful of half-hearted arguments that it was unconstitutional, and just one based on nondelegation principles.³⁵² Congress apparently felt free to propose and debate delegations to different actors in nonconstitutional terms. It adopted an approach expressly modeled on British practice, even though the Founding generation's alleged distrust of delegation was—according to nondelegationists—a reaction against the British constitution's permissiveness in this regard.³⁵³

Remission's improvisational foundations become even more evident when viewed within the broader framework of the customs laws more generally. Much of the legislation Congress wrote in this area was highly detailed, specifying everything from the precise duties on rum, steel, and salt³⁵⁴ to the size of the containers in which beer and wine could be imported into the United States.³⁵⁵ According to Jennifer Mascott, members of the First Congress believed that, at least with respect to duties on goods, legislative specificity helped ensure that the customs laws balanced conflicting

to the Treasury Secretary. Act of March 3, 1797, § 43, 1 Stat. 199, 209. And in the 1797 debates over the Remission Act's reauthorization, several members revived the proposal from 1790 for a multi-member board, rather than the Treasury Secretary alone. See 6 ANNALS OF CONG. 2287 (Swanwick); *id.* (Coit); *id.* (Livingston).

³⁵¹ 6 ANNALS OF CONG. 2291 (Coit).

³⁵² See *supra* Part II.B-C.

³⁵³ See, e.g., Wurman, *supra* note __, at 34-37.

³⁵⁴ See Mascott, *supra* note __, at 1415-27.

³⁵⁵ See, e.g., Act of May 2, 1792, ch. 27, § 12, 1 Stat. 259, 259 (prohibiting importation of beer, ale, or porter in casks smaller than forty gallons or in packages of fewer than six dozen bottles); see also JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 44 (2012) (1791 Spirits Act specified "everything from the brand of hydrometer to be used in testing proof to the exact lettering to be used on casks that have been inspected").

state and regional economic concerns through the mechanism of representative politics.³⁵⁶

At the same time, Congress left critical aspects of this regulatory regime largely to executive discretion³⁵⁷—including the Remission Act’s authority to effectively rewrite the statutory penalties for customs violations. In other words, legislative specificity and executive discretion were not constitutionally irreconcilable modes of governance. They were simply different tools the early Congress reached for in order to meet the immediate challenges at hand.

B. Improvising Administration

Congress’s early willingness to experiment with administrative regimes becomes even more evident when we look across the domains of federal authority. Consider the episode that nondelegationists cite as powerful evidence of a demanding Founding-era doctrine: the 1792 statute establishing the national postal system. During debate over the legislation, Theodore Sedgwick proposed giving the President complete discretion to designate the roads on which the mail would travel.³⁵⁸ Echoing themes that arose in the Remission Act debates, Sedgwick asserted that the President had better information about the subject than Congress, and his decisions would not be “biassed by local interests.”³⁵⁹ The proposal’s opponents doubted both propositions: collectively, Congress knew more about local conditions,³⁶⁰ and granting authority to the President would give him a “dangerous power” he could use to his personal advantage.³⁶¹

Several opponents also asserted that such a delegation would be unconstitutional—a fact that nondelegationists cite as powerful

³⁵⁶ See Mascott, *supra* note __, at 1395.

³⁵⁷ See Mortenson & Bagley, *supra* note __, at 84 (Congress passed statutes governing customs enforcement procedures without “any meaningful guidance about the circumstances in which ships ought to be searched or the type of evidence that ought to make collectors think that fraud or smuggling was afoot”).

³⁵⁸ See 3 ANNALS OF CONG. 229 (1791) (Sedgwick) (post roads would be determined “by such route as the President of the United States shall, from time to time, cause to be established”).

³⁵⁹ See 3 ANNALS OF CONG. 229 (1791) (Sedgwick).

³⁶⁰ See 3 ANNALS OF CONG. 233 (1791) (White) (“No individual could possess an equal share of information with th[e] House on the subject of the geography of the United States.”).

³⁶¹ 3 ANNALS OF CONG. 235 (1791) (statement of Rep. Vining).

evidence of a robust Founding-era doctrine.³⁶² And in the final version of the statute, Congress specified the post roads in excruciating detail.³⁶³ Yet as scholars have pointed out,³⁶⁴ in the very same statute Congress gave the executive branch broad discretion to *extend* the post roads and to decide where post *offices* would be located.³⁶⁵

The mystery here is why Congress rejected a grant of executive discretion as to one part of the postal system but embraced as to other parts. The Constitution gives Congress the power to establish “Post Offices” and “post Roads,” so a partial grant of discretion is textually unjustifiable.³⁶⁶ A better explanation is that apportioning decision-making authority in this manner was simply the best way to satisfy competing interests and concerns. Communities near designated post roads reaped significant economic advantages, so representatives in the House may have been eager to specify by statute that the roads would run in their districts.³⁶⁷ But members of Congress likely had less enthusiasm for making adjustments to the routes going forward, a task that—like addressing remission petitions—would require constant legislative attention.³⁶⁸ Congress therefore left it to the executive branch to “extend[]” the system as it saw fit.³⁶⁹ In the end, as with the customs regime, a balance of legislative specification and executive discretion may have best accommodated the various interests at play.

³⁶² See Gordon, *supra* note __, at 744-47; Lawson, *Original Meaning*, *supra* note __, at 402-03; POSTELL, *BUREAUCRACY*, *supra* note __, at 75-77 (2017); Wurman, *supra* note __, at 8-11.

³⁶³ See Act of Feb. 20, 1792, § 1, 1 Stat. 232, 232-33.

³⁶⁴ See Chabot, *supra* note __, at 41; Mortenson & Bagley, *supra* note __, at 94-96; Wurman, *supra* note __, at 18-19.

³⁶⁵ See Act of Feb. 20, 1792, § 2, 1 Stat. 232, 233 (Postmaster General can enter into contracts “for extending the line of posts”); *id.* at 234, § 3 (Postmaster General has authority to appoint deputy postmasters “at all places where such shall be found necessary”).

³⁶⁶ U.S. Const., art. I, § 8, cl. 7. Ilan Wurman explains the discrepancy by arguing that the delegations of authority to extend the post roads and site post offices were “less significant,” because “the important question of the day” was the designation of the initial roads. See Wurman, *supra* note __, at 18-19. But Wurman’s argument is premised almost entirely on his *own* view of the relative importance of each feature of the statutory scheme. See *id.*

³⁶⁷ See ANNALS OF CONG. 241 (1791) (Sedgwick) (noting that opponents of executive discretion “had a very important interest in establishing the directions of the post”); David P. Currie, *The Constitution in Congress: The Federalist Period: 1789-1801*, at 149 (1997) (“[O]ne is tempted to attribute the House’s zest for detail more to a taste for pork than to a principled concern for the virtues of representative government.”);

³⁶⁸ See MASHAW, *supra* note __, at 46 (Congress was concerned that it would be inundated with “demands for the expansion of the postal service”).

³⁶⁹ See Act of Feb. 20, 1792, § 2, 1 Stat. 232, 233.

Or take another example: the Patent Acts of 1790 and 1793. Within weeks of convening, the First Congress received petitions from inventors seeking private legislation confirming their intellectual property rights—as state legislatures had traditionally done.³⁷⁰ Apparently concerned about the volume of work involved, Congress immediately sought to allocate responsibility elsewhere.³⁷¹ It considered a number of different arrangements, including juries and private referees.³⁷² As commentators have noted, Congress ultimately gave authority to a panel of executive branch officers to grant patents to any invention they deemed “sufficiently useful or important.”³⁷³ Even nondelegationist scholars admit: This was a broad grant of discretion in an area of significant economic importance.³⁷⁴

Congress revised the Act in 1793. Among other changes, executive officers no longer had the discretion to approve or deny a patent on “useful or important” grounds. Instead, the Secretary of State and Attorney General had *no* discretion; they were to grant a patent in response to any application that met the statute’s technical requirements.³⁷⁵ Rival inventors could then challenge issued patents in court on various grounds. This change left the judiciary, rather than the executive, as the institution ultimately responsible for determining which inventions would receive protection.³⁷⁶

Contrary to what one nondelegationist asserts, Congress did not make this change out of concern that the 1790 Act unconstitutionally delegated legislative authority to the executive branch.³⁷⁷ As recalled twenty years later by Thomas Jefferson (the 1793 Act’s

³⁷⁰ See McKinley, *supra* note __, 1563-65.

³⁷¹ See *id.* at 1565.

³⁷² Chabot, *supra* note __, 36.

³⁷³ Act of Apr. 10, 1790, 1 Stat. 109, 110 (patent will issue on the vote of two of the Secretary of State, Secretary of War, and Attorney General); see Chabot, *supra* note __, 28-38; Posner & Vermuele, *supra* note __, 1735.

³⁷⁴ See Wurman, *supra* note __, at 52 (acknowledging the Patent Act “leaves a lot of discretion” to the executive branch).

³⁷⁵ See Act of Feb. 21, 1793, § 1, 1 Stat. 318-21; The Patent Act of 1793, 18 J. PAT. OFF. SOC’Y 77, 81 (1936) (the 1793 Act “made the grant of a patent purely a clerical matter”).

³⁷⁶ See Thomas Jefferson to Isaac McPherson, 13 August 1813, <https://founders.archives.gov/documents/Jefferson/03-06-02-0322> (“[I]nstead of refusing a patent in the first instance, as the [executive] board was authorised to do, the patent now issues of course, subject to be declared void on such principles as should be established by the courts of law.”).

³⁷⁷ See Gordon, *supra* note __, 796-97.

prime mover³⁷⁸), the institutional rearrangement was a matter of efficiency. Under the 1790 Act, the executive board developed a few general rules in determining whether to grant patents, but an “abundance of cases” fell outside their scope.³⁷⁹ Deciding these cases took time—more than the cabinet officers could “spare from higher duties.”³⁸⁰ So the 1793 Act turned responsibility “over to the judiciary,” to allow the patent-granting process “to be matured into a system” that would enable inventors to know their rights.³⁸¹

Importantly, Jefferson did not think (at least in hindsight) that this was actually the best way to award patents. Judges’ educations left them ill-prepared to decide questions of scientific merit, and inventors would therefore find little guidance in “the lubberly volumes of the law.”³⁸² Jefferson would have preferred leaving the matter to a board of “Academical professors” instead.³⁸³ But a proposal to create a separate department to handle patents was roundly opposed in Congress in 1793.³⁸⁴ And because England had adopted the judicial model, “the usual predominancy of her examples,” according to Jefferson, led to a similar arrangement in the United States.³⁸⁵

The parallels between the Patent and Remission Acts are revealing. In both, Congress sought to divest itself of legislative authority to decide important questions of private right.³⁸⁶ It considered delegating its power to several different configurations of judicial and executive branch officials. It ultimately settled on an arrangement that offered administrative advantages, but was not inherently the right choice. Indeed, it may have largely been a reflexive retreat to familiar models derived from British practice. And all the while, few constitutional objections (if any) emerged.

³⁷⁸ See Chabot, *supra* note __, at 32; Thomas Jefferson, “A Bill to Promote the Progress of the Useful Arts, [1 December 1791],” <https://founders.archives.gov/documents/Jefferson/01-22-02-0322>.

³⁷⁹ Thomas Jefferson to Isaac McPherson, 13 August 1813, <https://founders.archives.gov/documents/Jefferson/03-06-02-0322>.

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ See 2 ANNALS OF CONG. 855 (Baldwin) (objecting to any proposal “which should provide for the institution of a new department); *id.* (Williamson) (“He was decidedly opposed to creating a new Department.”)

³⁸⁵ Thomas Jefferson to Isaac McPherson, 13 August 1813, <https://founders.archives.gov/documents/Jefferson/03-06-02-0322>; see also 2 ANNALS OF CONG. 855 (Williamson) (asserting that the 1793 Act “was an imitation of the Patent System of Great Britain”).

³⁸⁶ On patents as private rights, see *supra* note __.

These are just a few of many examples of Congress's early experimentation in arranging institutional decision-making, many of which involved broad delegations of discretionary authority.³⁸⁷ It did the same with military pensions,³⁸⁸ the governance of federal territories,³⁸⁹ and management of the national debt.³⁹⁰ Indeed, as historians have recently demonstrated, this kind of administrative creativity extended across the many domains of federal governance, in areas as diverse as revenue collection,³⁹¹ military development,³⁹² disaster relief,³⁹³ land sales,³⁹⁴ and public subsidies³⁹⁵ (among others).

This improvisation—and uncertainty—extended not just to the allocation of powers, but also to the assignment of personnel. The early federal government was deeply understaffed,³⁹⁶ and the early Congress routinely sought to enlist various federal and state officers to fulfill multiple government functions³⁹⁷ (as did the executive branch³⁹⁸). At times these efforts prompted constitutional objections, but not on delegation grounds. Famously, in *Hayburn's Case* the Justices of the Supreme Court raised constitutional doubts

³⁸⁷ See generally Mashaw, *supra* note __, at 34-50.

³⁸⁸ See McKinley, *supra* note __, at 1586-89 (describing early congressional efforts to enlist the executive and judiciary branches in resolving pension claims); Parrillo, *Critical Assessment*, *supra* note __, at 33 & n.123 (describing discretion granted to President in 1790 pension statute).

³⁸⁹ See Mortenson & Bagley, *supra* note __, at 70-75 (describing discretion granted to executive branch officials in administering the Northwest Territory and the District of Columbia).

³⁹⁰ See Chabot, *supra* note __, at 22-25 (detailing discretion given to the Sinking Fund Commission, composed of executive and judicial officers).

³⁹¹ See generally RAO, *supra* note __.

³⁹² See MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* (2003); MAX M. EDLING, *A HERCULES IN THE CRADLE: WAR, MONEY, AND THE AMERICAN STATE, 1783-1867* (2014).

³⁹³ See Michele DAUBER, *The Sympathetic State: Disaster Relief and the Origins of the American Welfare State* (2012).

³⁹⁴ See GREG ABLAVSKY, *FEDERAL GROUND: SOVEREIGNTY, PROPERTY, AND LAW IN THE U.S. TERRITORIES, 1783-1802* (2021); PAUL FRYMER, *BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION* (2017).

³⁹⁵ See BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* (New York, 2009); RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* (1995).

³⁹⁶ See RAO, *supra* note __, at 69.

³⁹⁷ See Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1161-65 (2013) (describing early federal statutes imposing “administrative burdens” on state officials).

³⁹⁸ See Kevin Arlyck, *Courts and Foreign Affairs at the Founding*, 2017 B.Y.U. L. REV. 1, 35 (describing Washington Administration efforts to enlist federal and state officers in preventing French maritime attacks on British vessels).

about their role in deciding who was eligible for Revolutionary War pensions, because the statutory scheme effectively allowed Congress and the Secretary of War to overrule their decisions.³⁹⁹ In response, Congress created a new scheme in which judges only took evidence and transmitted it to the Secretary⁴⁰⁰—a role remarkably similar to the one Congress ultimately assigned to federal judges under the Remission Act.⁴⁰¹ Even though assignment of these considerable administrative duties apparently rankled some judges, no constitutional complaints ever arose.⁴⁰²

To be sure, the possibility that there was *some* original constitutional limit on Congress’s ability to delegate its powers is not preposterous. As this article (and others) have demonstrated, nondelegation arguments popped up occasionally in early legislative debates, and it seems unlikely that sophisticated skeptics of executive power (like James Madison), would bother with arguments that could not pass the laugh test. But whatever constitutional principle Madison and others had in mind, it clearly did not have much purchase. Across the federal government, Congress made decisions about where it should locate decision-making authority not by reference to immovable principles of constitutional law, but through the rough and tumble of legislative politics.

Indeed, according to Hamilton, that was the way it should be. When he first proposed that Congress vest its remission authority “somewhere,” Hamilton indicated that the legislature could “safe[l]y” delegate that power to another entity, but he did not specify to whom.⁴⁰³ A question of such “delicacy and importance,” according to Hamilton, would best be answered after “mature deliberation” by Congress.⁴⁰⁴ In the end, the choice of whether—and where—to delegate legislative authority was left to the legislature itself.

³⁹⁹ See Maeva Marcus & Robert Teir, *Hayburn’s Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527.

⁴⁰⁰ Act of Feb. 28, 1793, 1 Stat. 324, 324-25.

⁴⁰¹ See *supra* note ___ and accompanying text (describing judicial role in developing a “statement of facts” in remission cases).

⁴⁰² See James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 26 (2008) (quoting 1800 statement from district court judge that remission petitions “add much to the increase of business to the judges, in matters too, not strictly within the line of their Judicial functions”).

⁴⁰³ Saddler Report, *supra* note ___.

⁴⁰⁴ Saddler Report *supra* note ___.

CONCLUSION

On its own, the Remission Act may not prove that a restrictive version of the nondelegation doctrine is historically unjustified. The Act is just one instance of early federal legislation granting the executive branch broad discretion to fashion rules governing private conduct. And it is an odd one, at that. The Treasury Secretary did not formally make prospective rules. He simply altered or dispensed with Congress's statutory directives as he saw fit, even if he did so consistently and predictably. In so doing, the Secretary exercised discretion that was greater than—but not wholly distinct from—the law-enforcing authority we conventionally understand executive branch officials to enjoy. As the Remission Act's chief congressional defender, Fisher Ames, suggested, perhaps remission as a form of constitutional authority was neither fish nor fowl.⁴⁰⁵ And perhaps remission's defiance of easy categorization is what made its delegation to the executive constitutionally palatable.

If remission's peculiarity may be a plausible explanation for the Act's passage and persistence, it is not the best one. Even if couched in unusual form, the power Congress granted to the Treasury Secretary in 1790 was unmistakably broad and fundamentally legislative. That is likely why no one in Congress bothered to defend the Act's constitutionality on the ground of exceptionality. Nor was the Act the only such delegation the early Congress made. As this article shows, it is similarly difficult to explain away other examples on the basis of distinctions no one at the Founding made, and likely would have rejected. If there was a Founding-era consensus that the Constitution incorporated some sort of nondelegation principle, apparently it did not meaningfully limit Congress's ability to give away its power.

The difficulty of pigeonholing remission highlights a broader point, as well. In this and many other areas, the early Congresses often showed little interest in articulating a careful taxonomy of offices and powers. When it came to designing an efficient and responsive administrative system of federal governance, the Founding generation did not traffic much in constitutional absolutes. That, of course, is a challenge for judges and scholars who seek to ground definitive statements of constitutional principle in historical evidence.⁴⁰⁶ If nothing else, it suggests that the search for a "useable

⁴⁰⁵ 6 ANNALS OF CONG. 2288 (Ames) (remission was "neither Judicial nor Legislative" power).

⁴⁰⁶ Compare *Mortenson & Bagley* supra note __, at 113 ("There was no nondelegation doctrine at the founding, and the question isn't close."), with *Gundy*, 139 S.Ct. at 2139 (Gorsuch, J., dissenting) (the Court's current "intelligible principle" test "has no basis in

past” by those who advocate for a more stringent version of the nondelegation doctrine may be unproductive.⁴⁰⁷

the original meaning of the Constitution [or] in history”), and Wurman, *supra* note __, at 1 (“[T]here is significant evidence that the founding generation adhered to a nondelegation doctrine.”).

⁴⁰⁷ See Cass Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601 (1995).